> to the country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; *without some protection for seeking out the news, freedom of the press could be eviscerated*.

Id. at 681 (emphasis added). This constituted the Court's first acknowledgement of a First Amendment right to gather news. Importantly, the Court went on to recognize that freedom of the press is not confined to news reporters and major newspapers, but rather "a 'fundamental personal right' which . . . 'necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.'" *Id.* at 704 (quoting *Lovell v. City of Griffin*, 303 U.S. 444, 450, 452 (1938)).

It is not immediately clear how these two opinions interact and what the boundaries are for the information gathering rights they discuss. News-gathering is clearly entitled to some First Amendment protection under *Branzburg*, but in *Zemel*, information gathering by members of the general public apparently does not merit First Amendment consideration. McDonald, 65 Ohio St. L.J. 249, 303. One way to make sense of these opinions is to interpret *Zemel* as showing that even if a person intends to eventually communicate their findings to others, such a "generalized speech presumption" is not a sufficient basis for recognizing a First Amendment claim, *id.* at 331, while *Branzburg* shows that a right to gather information under the First Amendment should be limited to contexts where "the public dissemination of that information can be assured," *id.* at 331–32. In other words, limitations on speech are warranted where the vehicle for speech (e.g., a single citizen's trip to Cuba) does not sufficiently lend itself to the service of a public interest. This interpretation steers clear of authorizing limitations based on the speaker or the subject matter. This is important because granting protection to the gathering of information about "news," but not the conditions in Cuba, would be at odds with the general rule of First Amendment law that

the government cannot restrict speech on the basis of content or subject matter. *Id.* at 329–30. As McDonald writes, the *Zemel-Branzburg* decisions:

> [M]ay suggest . . . that the recognition of a right to gather information [is] only . . . appropriate in situations where the societal, versus the individualistic, purposes of the First Amendment are being served in an identifiable way. . . . [S]uch protection might be reserved to those channels of communication, like the organized press, that society relies upon for the dissemination of important information to the public.

Id. at 332.

Lower courts have taken this framework for understanding *Zemel* and *Branzburg* and stretched it to accommodate new situations over time. Because *Branzburg* "based what protection it did accord to newsgathering on 'freedom of the press' principles, it seems to have created a general perception . . . that the acquisition of 'news' . . . is the only (or at least the main) type of information-gathering activity that merits constitutional protection." *Id.* at 303. There is now a substantial and highly publicized body of case law addressing what has come to be known as a "right to record" or "right to film" police officers and other government officials. *See, e.g.*, *Irizarry v. Yehia*, 38 F.4th 1282 (10th Cir. 2022) (holding that a journalist had a First Amendment right to film police performing their duties in public); *Project Veritas Action Fund v. Rollins*, 982 F.3d 813 (1st Cir. 2020) (holding that a Massachusetts statute prohibiting secret recording of police officers discharging their official duties in public spaces violated the First Amendment); *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011) (holding that police officers are not entitled to qualified immunity for arresting someone who filmed them as they arrested another individual). This right to record is derived from the principle that "gathering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting the free discussion of governmental affairs." *Rollins*, 982 F.3d at 832 (quoting *Glik*, 655 F.3d at 82).

These decisions show how the concept of a right to gather news or information has been broadened far beyond the original context of *Branzburg*. The right to record police in public is available to normal citizens and not limited to news reporters or other members of the press. The public's right of access to information has been held to be "coextensive with that of the press[,] [in part because] changes in technology and society have made the lines between private citizen and journalist exceedingly difficult to draw." *Glik*, 655 F.3d at 83–84.

Even more relevant to this memorandum are decisions that have asserted a right to gather information in circumstances that do not involve the actions of government officials. For example, the Eighth Circuit held that a private citizen recording children in a public park was protected speech because it was related to an expressive purpose. *See Ness v. City of Bloomington*, 11 F.4th 914 (8th Cir. 2021). The Ninth Circuit found that animal rights activists entering a private agricultural facility without consent and recording its operations was protected speech because it concerned a matter of public interest. *See Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018). And the Tenth Circuit held that the collection of resource data from public lands was protected speech because it furthered public debate and the free discussion of governmental affairs. *See W. Watersheds Project v. Michael*, 869 F.3d 1189 (10th Cir. 2017). These decisions all emphasize the protection of speech that serves a public interest or furthers public discussion. The decisions involving police, by contrast, also take into consideration the separate concern of preventing abuses by law enforcement officials. *See, e.g.*, *Glik*, 655 F.3d at 82–83.

II. General Right to Photograph in Public Spaces

Some private companies now argue that they possess a First Amendment right to gather photographs of people and their property (information) if this information is obtained in a public space or is otherwise publicly available. *See* Cyrus Farivar, *Private firms argue First Amendment*

right to collect license plate data, Ars Technica (Feb. 14, 2014), https://arstechnica.com/tech-policy/2014/02/private-firms-argue-first-amendment-right-to-collect-license-plate-data/ (discussing private firms' argument that they have a right to collect license plate data displayed in public); Vera Eidelman, *Clearview's Dangerous Misreading of the First Amendment Could Spell the End of Privacy Laws*, ACLU (Jan. 7, 2021), https://www.aclu.org/news/privacy-technology/clearviews-dangerous-misreading-of-the-first-amendment-could-spell-the-end-of-privacy-laws (discussing Clearview's argument that it has a right to capture faceprints through publicly available social media posts). Is there merit to these claims?

Though the right to gather information under the First Amendment has been expanded over time, there does not appear to be case law supporting the idea that any photography or recording in public spaces is protected speech. Courts continue to demand that a clear expressive purpose exists before holding that video recording or photographic information gathering constitutes protected speech. *See, e.g.*, *Ness*, 11 F.4th at 923; *see also Porat v. Lincoln Towers Cmty. Ass'n*, No. 04 CIV. 3199 (LAP), 2005 WL 646093, at *4–5 (S.D.N.Y. Mar. 21, 2005) (finding that plaintiff's recreational photography of a residential building was not protected by the First Amendment because it lacked a message to be communicated and an audience to receive that message). With this in mind, perhaps a private company could claim a First Amendment right to collect license plate data by arguing that their purpose in doing so is to further public discussion on, for example, the reduction of crime. However, this position is difficult to defend when the more obvious purpose is to sell the data to law enforcement. Even more blatantly mercantile is the practice of selling such data to private investigators or repossession companies. *See* Joseph Cox, *This Company Built a Private Surveillance Network. We Tracked Someone with It*, VICE (Sept.

17, 2019, 10:45 AM), https://www.vice.com/en/article/ne879z/i-tracked-someone-with-license-plate-readers-drn.

Perhaps because of the difficulty of establishing expressive purpose, private companies argue instead that the act of gathering photographs from public spaces is inherently protected speech. *See* Defendant's Memorandum in Support of Its Motion to Dismiss at 16, *ACLU v. Clearview AI, Inc.* (Ill. Cir. Ct. of Cook County Oct. 7, 2020) (No. 20 CH 04353), https://www.aclu.org/defendants-memorandum-support-its-motion-dismiss. This position finds support among some legal commentators. They argue that recent developments in technology and social practice have made captured images part of society's cultural and political discourse and that, like music, images are inherently expressive. *See* Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. Pa. L. Rev. 335, 372–73 (2011). Inherently expressive activities are afforded protection without inquiry into whether a specific message is conveyed. *See id.* at 373. Furthermore, captured images should not require an audience to be considered expressive, because "[i]n the emerging environment of pervasive image capture, the difference between capturing images and disseminating images erodes rapidly." *Id.* at 376. With some images being instantly live streamed, and others held for editing before upload, it is difficult to draw a logical line delineating when a captured image becomes expressive. *See id.* at 377. A simpler solution is to hold that images themselves are necessarily tied to acts of expression.

One might find these arguments persuasive, but there is still a lack of case law affirming that photography in public spaces is protected speech by default. Nevertheless, there is some merit to the assertion that there exists a right to take photographs of others or their property in public. While there is no guaranteed First Amendment right to take such photographs, the only protections

generally available to someone who does not wish to be photographed are common law privacy torts, which are exceedingly limited in scope. *See id.* at 352–53. There are also some legislative initiatives directed at curtailing image capture, but these are confined to very specific circumstances such as nonconsensual upskirt photography and wiretapping. *See id.* at 354–66. Thus, what might be called a "quasi-right" to photograph arises out of the lack of privacy protection afforded to citizens who venture into public spaces. *Cf.* Bert Krages, *The Photographer's Right: Your Rights and Remedies When Stopped or Confronted for Photography*, Bert P. Krages II (Jan. 2016), http://www.krages.com/ThePhotographersRight.pdf (asserting that the general rule in the United States is that anyone may take photographs of whatever they want when they are in a public place).

In general, one who voluntarily places themselves in the public eye will have no remedy under existing privacy torts if they are photographed against their will, because they will be judged under a "reasonable expectation of privacy standard." *See, e.g.*, *Deteresa v. Am. Broad. Companies, Inc.*, 121 F.3d 460 (9th Cir. 1997) (holding that videotaping a woman's conversation despite her refusal to appear on television was not an invasion of privacy because she was taped in public view from a public place and thus lacked a reasonable expectation of privacy); *see also* Kreimer, at 353–54 (describing how cases involving public privacy claims tend to run aground on either the absence of a reasonable expectation of privacy or on a news worthiness defense). Calls to expand privacy torts to encompass nonconsensual image capture in public spaces have "not yet begun to bear abundant fruit in case law." Kreimer, 159 U. Pa. L. Rev. 335, 353.

The reasonable expectation of privacy standard was first introduced in the context of Fourth Amendment jurisprudence in *Katz v. United States*, 389 U.S. 347 (1967), but, as demonstrated by *Deteresa*, has since "permeate[d] the rhetoric of privacy even in areas outside of constitutional

law." Joel R. Reidenberg, *Privacy in Public*, 69 U. Miami L. Rev. 141, 143 (2014). The upside of the widespread use of this standard in the privacy context is that it lends itself to arguments emphasizing the invasive nature of emerging surveillance technology. Though a person may lack a reasonable expectation of privacy upon entering a public space in the sense that they assume the risk of being photographed without their consent, it is far more difficult to assert that the same person has also assumed the risk of having their movements in public spaces systematically tracked over time. License plate reading technology enables precisely this type of tracking and has already been used for this purpose. *See You Are Being Tracked*, ACLU, https://www.aclu.org/issues/privacy-technology/location-tracking/you-are-being-tracked (last visited July 19, 2022).

Even if it is assumed that private companies have a First Amendment right to collect this type of data, the ways in which the data is used can be challenged on invasion of privacy grounds by asserting that the data subjects' reasonable expectation of privacy has been violated. Such an argument was neatly demonstrated in *ACLU v. Clearview.* Clearview characterized their collection and use of publicly available photographs as the "creation and dissemination of information," which the Supreme Court has held is speech under the First Amendment. Defendant's Memorandum in Support of Its Motion to Dismiss at 16 (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011)). In denying the defendant's motion to dismiss, the court noted that these activities were entitled to some First Amendment protection, but:

> That does not end the inquiry. The First Amendment does not fully protect every act that involves collection or analysis of data. For instance, stealing documents and private wiretapping involve collection of data, but they are not protected by the First Amendment even if the purpose is to obtain information for a news story. *Branzburg v. Hayes*, 408 U.S. 665, 691 (1972).

Memorandum Opinion and Order at 8–9, *ACLU v. Clearview AI, Inc.* (Ill. Cir. Ct. of Cook County Aug. 27, 2021) (No. 20 CH 04353), https://www.aclu.org/opinion-denying-clearview-ais-motion-dismiss. The court went on to state:

> The fact that something has been made public does not mean anyone can do with it as they please. In the Fourth Amendment context, where the "expectation of privacy" concept is most common, law enforcement is not always allowed to use technology to analyze what is public and visible. For instance, the U.S. Supreme Court held in *Kyllo v. United States*, 533 U.S. 27, 35–36, that law enforcement could not aim an infrared heat scanner at the exterior of a house to search for drugs. So, too, in our case the photos may be public, but making faceprints from them may be regulated.

Memorandum Opinion and Order at 11.

Conclusion

The Supreme Court introduced the First Amendment right to gather information in *Zemel* and *Branzburg* to ensure that the freedoms of speech and the press were protected in the news-gathering context. Lower courts have subsequently expanded this right to protect information gathering by any private citizen where the information gathering activity sufficiently serves a public interest. Contrary to what some private companies now claim, under existing First Amendment precedent, there is no broad right to photograph or record in public spaces absent this public interest requirement. However, challenges to public image capture rarely succeed because existing privacy protections for citizens who enter public spaces are very limited. If legislators do not enhance privacy protections, it may be difficult to challenge the activities of companies that operate automatic license plate readers. Nevertheless, one promising avenue for challenge is violation of the reasonable expectation of privacy standard. This is especially promising given that companies are sharing their data with law enforcement, which may pose additional Fourth Amendment concerns.

Applicant Details

First Name	**Liam**
Middle Initial	**D**
Last Name	**Mahagan**
Citizenship Status	**U. S. Citizen**
Email Address	**liam-d-mahagan@berkeley.edu**
Address	**Address** Street **2100 Channing Way, Apt 247** City **Berkeley** State/Territory **California** Zip **94704** Country **United States**
Contact Phone Number	**4692365586**

Applicant Education

BA/BS From	**University of Texas-Austin**
Date of BA/BS	**December 2020**
JD/LLB From	**University of California, Berkeley School of Law** **https://www.law.berkeley.edu/careers/**
Date of JD/LLB	**May 8, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Berkeley Business Law Journal**
Moot Court Experience	**Yes**
Moot Court Name(s)	**McBaine Honors Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Professional Organization

Organizations	**Just the Beginning Organization**

Recommenders

Van Houweling, Molly
msvh@berkeley.edu
Feinberg, Brian
theprofessorfeinberg@gmail.com

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Liam Mahagan
2100 Channing Way, Apt. 247, Berkeley, CA 94704
liam-d-mahagan@berkeley.edu | 469-236-5586

The Honorable Juan Ramon Sánchez

United States District Court

Eastern District of Pennsylvania

James A. Byrne United States Courthouse

601 Market Street, Room 14613

Philadelphia, PA 19106

Dear Chief Judge Sánchez:

I am a rising third-year student at Berkeley Law, and I am writing to apply for a 2024-25 term clerkship in your chambers. As a student with an interest in practicing litigation in Philadelphia, and serving in the public sector, I believe clerking for your chambers would be ideal for me.

As illustrated by my grades, my writing sample, and my work history, I believe I would be a great fit for the position due to my critical thinking skills, my legal analytical skills, and my work ethic. Additionally, as a first generation professional, I am excited for the opportunity to bring my experiences and perspective to your chambers.

Moreover, as a judge with extensive experience handling cases related to Prisoner Rights, Criminal Law, and Civil Rights, I am interested in gaining more experience in these areas of law from the perspective of the judiciary. As a student who hopes to practice public interest in Philadelphia, such experience would be valuable for me. Furthermore, as a judge who has practiced public interest in the past, I am hoping to gain insight from you directly in pursuing that career path. I am also interested in your mission to support law graduates in their goal of practicing public interest law.

Enclosed please find my resume, my writing sample, and my law school transcript. I would like to thank you very much for your time in reading my application, and I am looking forward to hearing from you soon.

If there is any other information that would be helpful to know, please let me know. Thank you for your consideration.

Liam Mahagan

Sincerely, Liam Mahagan

Liam Mahagan

2100 Channing Way, Apt. 247, Berkeley, CA 94704
liam-d-mahagan@berkeley.edu | 469-236-5586

EDUCATION

University of California, Berkeley, School of Law, Berkeley, CA
J.D. Candidate, May 2024
Honors: Halloum Negotiations Competition Quarter-Finalist
1L Academic Distinction – Top 15%
2L Academic Distinction – Top 15%
Activities: *Berkeley Business Law* Journal
Berkeley Anti-Trafficking Program
McBaine Honors Moot Court

University of Texas, Austin, Austin, TX
B.A., *magna cum laude*, in Government, Dec. 2020
Honors: Dean's List all semesters
Activities: Neighborhood Longhorns Program Elementary School Tutor
Delta Sigma Phi Fraternity

EXPERIENCE

United States Attorney's Office – Civil Division, San Francisco, CA Aug. 2023 – Dec. 2023
Law Clerk

San Francisco District Attorney's Office, San Francisco, CA June 2022 – Aug. 2022, June 2023 – Aug. 2023
Law Clerk
Wrote motions, conducted legal research, and prepared arguments to assist with hearings and trials for prosecutors in the Domestic Violence Unit and Vulnerable Victims Unit. Worked on a novel legal issue regarding the constitutionality of California's gun registration requirements following the *Bruen* decision.

Berkeley Business Law Journal, Berkeley, CA Sept. 2021 – Present
Associate Editor, Network Contributor, Supervising Editor
Edit submitted articles. Analyze sources to ensure adequate support of article subject matter. Supervise teams of associate editors. Ensure timely completion of edits and revisions. Write blog articles on topics in corporate law.

The Home Depot, Wylie, TX Feb. 2021 – July 2021
Professional Sales Associate, Special Services Associate
Sold building materials, tools, and hardware to professional contractors. Created, processed, and facilitated orders and deliveries. Processed returns and transactions.

INTERESTS

Musical theatre. Classical movies and music. DIY house projects. Reading classical literature, science fiction, and fantasy. Military history. Quentin Tarantino movies.

Berkeley Law
University of California
Office of the Registrar

Liam D Mahagan
Student ID: 3036853751
Admit Term: 2021 Fall

Printed: 2023-06-09 13:27

Academic Program History
Major: Law (JD)

Awards

Prosser Prize 2022 Fall: Evidence

2021 Fall

Course		Description	Units	Law Units	Grade
LAW	200F	Civil Procedure Catherine Fisk	5.0	5.0	H
LAW	202.1A	Legal Research and Writing Michelle Cole	3.0	3.0	CR
LAW	202F	Contracts Reza Dibadj	4.0	4.0	H
LAW	230	Criminal Law Saira Mohamed	4.0	4.0	P

	Units	Law Units
Term Totals	16.0	16.0
Cumulative Totals	16.0	16.0

2022 Spring

Course		Description	Units	Law Units	Grade
LAW	201	Torts Kenneth Bamberger	4.0	4.0	HH
LAW	202.1B	Written and Oral Advocacy **Units Count Toward Experiential Requirement** Michelle Cole	2.0	2.0	P
LAW	203	Property Molly Van Houweling	4.0	4.0	HH
LAW	220.6	Constitutional Law **Fulfills Constitutional Law Requirement** Jennifer Chacon	4.0	4.0	HH

	Units	Law Units
Term Totals	14.0	14.0
Cumulative Totals	30.0	30.0

2022 Fall

Course		Description	Units	Law Units	Grade
LAW	207.5	Advanced Legal Writing **Fulfills 1 of 2 Writing Requirements** Ryan Wagner Brian Feinberg	2.0	2.0	HH
LAW	210	Legal Profession **Fulfills Professional Responsibility Requirement** Dena Roche	2.0	2.0	H
LAW	241	Evidence Jonah Gelbach	4.0	4.0	HH
LAW	250	Business Associations Emily Strauss	4.0	4.0	H
LAW	261.2	Intern. Litigation&Arbitration Neil Popovic	3.0	3.0	P

	Units	Law Units
Term Totals	15.0	15.0
Cumulative Totals	45.0	45.0

2023 Spring

Course		Description	Units	Law Units	Grade
LAW	222	Federal Courts William Fletcher	3.0	3.0	H
LAW	231	Crim Procedure-Investigations Orin Kerr	4.0	4.0	HH
LAW	245.2	Civil Trial Practice **Units Count Toward Experiential Requirement** Winifred Smith Evelio Grillo	3.0	3.0	H
LAW	248.5	Mergers & Acquisitions Reza Dibadj	3.0	3.0	H
LAW	267.51	Introduction to Roman Law Laurent Mayali	1.0	1.0	CR
LAW	295.3J	McBaine Moot Court Competition **Units Count Toward Experiential Requirement** Gregory Washington	2.0	2.0	CR

	Units	Law Units
Term Totals	16.0	16.0

Carol Rachwald, Registrar

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Berkeley Law
University of California
Office of the Registrar

Liam D Mahagan
Student ID: 3036853751
Admit Term: 2021 Fall

Cumulative Totals	61.0	61.0	

2023 Fall

Course		Description	Units	Law Units	Grade
LAW	225	Legislation & Statutory Interp	3.0	3.0	
		Sean Farhang			
LAW	243	Appellate Advocacy	3.0	3.0	
		Fulfills Either Writing Requirement/Experiential			
		Scotia Hicks			
LAW	295	Civ Field Placement Ethics Sem	2.0	2.0	
		Fulfills Either Prof. Resp. or Experiential			
		Susan Schechter			
		Cheryl Stevens			
LAW	295.6A	Civil Field Placement	5.0	5.0	
		Units Count Toward Experiential Requirement			
		Susan Schechter			

	Units	Law Units
Term Totals	0.0	0.0
Cumulative Totals	61.0	61.0

Carol Rachwald, Registrar

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University of California
Berkeley Law
270 Simon Hall
Berkeley, CA 94720-7220
510-642-2278

KEY TO GRADES

1. Grades for Academic Years 1970 to present:

HH	–	High Honors	CR	–	Credit
H	–	Honors	NP	–	Not Pass
P	–	Pass	I	–	Incomplete
PC	–	Pass Conditional or Substandard Pass (1997-98 to present)	IP	–	In Progress
NC	–	No Credit	NR	–	No Record

2. Grading Curves for J.D. and Jurisprudence and Social Policy PH.D. students:

In each first-year section, the top 40% of students are awarded honors grades as follows: 10% of the class members are awarded High Honors (HH) grades and 30% are awarded Honors (H) grades. The remaining class members are given the grades Pass (P), Pass Conditional or Substandard Pass (PC) or No Credit (NC) in any proportion. In first-year small sections, grades are given on the same basis with the exception that one more or one less honors grade may be given.

In each second- and third-year course, either (1) the top 40% to 45% of the students are awarded Honors (H) grades, of which a number equal to 10% to 15% of the class are awarded High Honors (HH) grades or (2) the top 40% of the class members, plus or minus two students, are awarded Honors (H) grades, of which a number equal to 10% of the class, plus or minus two students, are awarded High Honors (HH) grades. The remaining class members are given the grades of P, PC or NC, in any proportion. In seminars of 24 or fewer students where there is one 30 page (or more) required paper, an instructor may, if student performance warrants, award 4-7 more HH or H grades, depending on the size of the seminar, than would be permitted under the above rules.

3. Grading Curves for LL.M. and J.S.D. students for 2011-12 to present:

For classes and seminars with 11 or more LL.M. and J.S.D. students, a mandatory curve applies to the LL.M. and J.S.D. students, where the grades awarded are 20% HH and 30% H with the remaining students receiving P, PC, or NC grades. In classes and seminars with 10 or fewer LL.M. and J.S.D. students, the above curve is recommended.

Berkeley Law does not compute grade point averages (GPAs) for our transcripts.

For employers, more information on our grading system is provided at: https://www.law.berkeley.edu/careers/for-employers/grading-policy/

Transcript questions should be referred to the Registrar.

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May 24, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I understand that Berkeley Law student Liam Mahagan is applying for a clerkship in your chambers. I was very impressed by Liam's performance in my class and predict he will bring a great work ethic and keen legal analysis to chambers. I am delighted to recommend him.

Liam was a student in my Property class in Spring 2022. In a class of 87 students, he was one of the most active participants in class discussion. His contributions reflected conscientious preparation, mastery of the material, and an eagerness to tackle interesting and difficult questions. I was very impressed by Liam's hard work, his energy, and his eagerness to engage with thorny legal doctrine.

Liam's thorough preparation served him well on the two exams in my class. He received a perfect score on the midterm exam (covering estates, future interests, and the notorious Rule Against Perpetuities). His final exam was also outstanding. His performance on the traditional issue-spotter portion of the exam was particularly strong, with comprehensive analysis of the issues raised. The only fault I identified in the other portions of the exam (which were more focused on property policy and theory) is that could have more thoroughly addressed a couple of counterarguments. I find this can be an issue for students who are particularly well prepared for an exam and therefore especially confident in their answers. I admired that preparation and confidence even as I deducted a couple of minor points from Liam's exam.

I see that Liam's outstanding performance in my class was no fluke. Indeed, he received high honors in every one of his doctrinal classes during that semester and his overall academic record is excellent (featuring many high honors grades and an award for one of the best class performances in Evidence).

Liam's quick mastery of legal material and his apparent confidence as a class participant and exam writer belie a hard road to law school success. Liam is a first-generation professional student who went to work at Home Depot before law school to save money to cover his expenses. Although this is an unusual route to law school, it is consistent with what I have observed about Liam's high energy and work ethic. These impressive characteristics will be valuable assets on a chambers team.

Please let me know if I can tell you anything else about Liam. I hope you take the opportunity to meet him.

Sincerely,

Molly S. Van Houweling

Molly Van Houweling - msvh@berkeley.edu

Berkeley Law

Brian Feinberg
Adjunct Lecturer
University of California, Berkeley
School of Law
Berkeley, CA 94720-7200
www.law.berkeley.edu

May 5, 2023

Re: Clerkship Candidate Liam Mahagan

To Whom it May Concern,

I am writing to recommend Liam Mahagan. I had the privilege of teaching Mr. Mahagan in my Advanced Legal Writing course at Berkely Law. I found his work product to be excellent, his curiosity to be commendable and his attitude exceptional.

In my course, Mr. Mahagan was tasked with a number of challenging written assignments and oral exercises. He quickly established himself as a gifted advocate in both respects. He is adept at case research and synthesizing legal concepts. In particular, I found his ability and willingness to connect abstract legal principles to far exceed his peers.

Mr. Mahagan was a valuable contributor in our classroom discussions and would be an asset to whatever profession he pursues. I recommend him without hesitation.

Sincerely,

Brian Feinberg
Brian Feinberg

The following writing sample is based on a hypothetical fact pattern from an Advanced Legal Writing assignment. The writing is substantially my own work, with some editing done in accordance with feedback from my professor.

STATEMENT OF FACTS

At 12:00 PM, police answered a response to a report of a theft at Best Buy. Earlier that day, Chris Walpole ("defendant") entered the store, intending to steal a MacBook Air worth $1299. Defendant brought a bag with him into the store, walked over to the MacBook aisle, and placed the laptop into the bag. After attempting to exit the store, he was apprehended by the Loss Prevention Officer. Once the police arrived, they searched the defendant, interviewed the LPO, and transported the defendant to the police station.

Before beginning the interrogation, the interrogating officer advised the defendant of his *Miranda* rights, and asked the defendant if he understood them. The defendant told the police that he understood his rights, and then began to wonder aloud "I'm just thinking, maybe I shouldn't say anything without a lawyer." The officer, wanting to confirm that the defendant was indeed requesting the assistance of counsel, asked the defendant "What do you mean?" The defendant answered "On TV, they always get a lawyer." Worried that the defendant was taking legal advice from television, the officer sought to bring the defendant back to reality by saying "You watch too much TV. Tell me what happened." Immediately, Chris told the officer that he stole the MacBook in order to write a resume for his job search.

ARGUMENT

The defense asks this Court to suppress the defendant's confession to the police. The defense alleges that the defendant's confession is inadmissible because it was made in response

to police questioning after the defendant had already invoked his right to an attorney, and did not waive his *Miranda* rights. The defense is mistaken, because the defendant did not actually invoke his right to an attorney as his reference to having a lawyer present was too ambiguous to be understood as an invocation of the right to counsel, and his response to police questioning constituted an implicit waiver of his *Miranda* rights.

POINTS AND AUTHORITIES

I. The defendant's musings about his potential need for an attorney did not qualify as an invocation of the right to an attorney.

The prosecution may not use, as evidence, any statement the defendant makes in interrogation unless the Defendant has been informed of their right to counsel, and the defendant has waived that right. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Furthermore, the standards as to whether the defendant waived his right to counsel are the same as those in determining whether the defendant has waived his right to remain silent. *Berghuis v. Thompkins*, 560 U.S. 370, 381 (2010). Once the defendant has waived their *Miranda* rights, they may reinvoke their rights at any time after waiving them. *Edwards v. Arizona*, 451 U.S. 477, 484 (1981). Once the defendant has invoked their *Miranda* rights, questioning must cease until the defendant reinitiates communication. *Id.* at 485. Such invocation; however, must be unambiguous. *Davis v. United States*, 512 U.S. 452, 459 (1994).

A. The Defendant waived his right to counsel by answering the officer's questions.

The defendant may waive their 5th amendment rights, as long as they do so "voluntarily, knowingly, and intelligently." *Miranda*, 384 U.S. at 444. Such waiver may be implicit, upon an inquiry into the "totality of the circumstances surrounding the investigation." *Fare v. Michael C.*, 442 U.S. 707, 724 (1979). A defendant who "knowingly and voluntarily waives his right to

counsel after having that right explained to him has indicated his willingness to deal with the police unassisted." *Davis*, 512 U.S. at 460.

In *Davis*, the Court held that the defendant had waived his right to counsel by continuing to answer the investigators' questions after being advised of his rights. *Id.* 455. The Court acknowledged the concern that some suspects would be discouraged from invoking their rights, but held that the primary protection afforded to the defendant was "the *Miranda* warnings themselves," and reiterated that a defendant's full comprehension of their *Miranda* rights is sufficient to dispel whatever inherent coercion there may be in the interrogation. *Id.* at 460. Thus, the Court held that the defendant had waived his rights voluntarily by continuing to answer the officer's questions after indicating that he had understood his rights as read to him by the police.

In *Berghuis*, the Court held that the defendant waived his *Miranda* rights implicitly by responding to the officer's questions. 560 U.S. at 385. In *Berghuis*, the defendant was given a written record of his *Miranda* rights, and the interrogating officer confirmed that he could read and understand English. *Id.* In addition, the defendant was given enough time to read the warnings. *Id.* at 368. By answering the officer's questions after nearly 3 hours of remaining mostly silent, the Court held that this constituted a "course of conduct" inconsistent with one who invokes their right to remain silent. *Id.* at 386.

In this case, the defendant waived his *Miranda* rights by speaking to the police. Like in *Davis*, the defendant was read his rights by the interrogating officer, and indicated that he understood those rights. 512 U.S. at 455. Furthermore, the fact that the officer read the *Miranda* warnings to the defendant, and the defendant indicated that he understood those rights, is enough to dispel any inherent coercion in the interrogation process. *Id.* at 460. This case is also similar to *Berghuis*, in that both defendants answered the officer's questions after being read their

warnings. 560 U.S. at 385. Much like the defendant in *Berghuis*, the defendant in this case engaged in a "course of conduct" which is inconsistent with the invocation of the right to remain silent. *Id.* Thus, the defendant in this case waived his *Miranda* rights.

Since the defendant was read his rights, and the defendant indicated that he understood them, the proper procedural safeguards were met. Since the defendant was afforded the proper protections under *Miranda*, and the defendant continued to answer the officer's questions, the defendant validly waived his right to counsel. 384 U.S. at 444.

B. The defendant's statement to the police officer regarding his right to an attorney was too ambiguous and equivocal to be considered a valid invocation of his right to counsel.

An invocation is considered unambiguous and unequivocal only if such a desire is sufficiently clear so that a reasonable police officer under the circumstances would understand the statement to be a request for an attorney. *Davis*, 512 U.S. at 459. A statement which fails to meet the requisite level of clarity will not prevent the officer from being able to question the defendant. *Id.* If a defendant is "indecisive in his request for counsel," there is no rule mandating that police must cease questioning. *See id.* at 460.

In *Davis*, the Court held that the defendant's statement to the police was not an invocation. *Id.* at 462. In that case, the defendant said "Maybe I should talk to a lawyer," about an hour and a half into the interview. *Id.* at 455. The officers asked him to clarify whether he was asking for a lawyer, to which the defendant responded that he was not. *Id.* After another hour into the interview, the defendant said "I think I want a lawyer before I say anything else." *Id.* At that point, the officers immediately ceased questioning. *Id.* The Court held that the defendant's first statement to the officers was not an unambiguous request for counsel, and thus the officers were not required to cease questioning. *Id.* at 462. Furthermore, the officers asked the defendant

a clarifying question as to whether he was actually requesting an attorney, and while the Court acknowledged this was good practice, it did not explicitly require this of police officers. *Id.* at 461.

In *People v. Roquemore*, the court held that the defendant did not invoke his right to counsel by asking if he could have a lawyer because such a question was not an unambiguous request for counsel. 31 Cal.Rptr.3d 214, 224 (Cal. Ct. App. 2005). In that case, the arresting officers advised the defendant of his rights, to which the defendant claimed to understand them, and proceeded to answer the officer's questions. *Id.* at 219. After a series of questions, it became clear to the police that the interrogation was leading nowhere when the defendant asked "Can I call a lawyer or my mom to talk to you?" *Id.* At this point, the police ceased questioning, not because they believed the defendant to be invoking his right to counsel, but because they believed further questioning would not be productive. *Id.* The court clarified that a waiver of one's Miranda rights may be either "express or implied" and that a defendant may implicitly waive their rights by acknowledging that they understand them, and subsequently answering the police's questions. *Id.* While the defendant argued that his statement constituted an assertion of the right to counsel during questioning, the court held that his statement could not be understood by a reasonable officer to be a clear invocation of the right to counsel. *See id.* at 224. Thus, the court held that the defendant did not invoke his right to counsel. *Id.*

In *In re Art T.*, the court held that the defendant's statement to the police, in that context, was an unambiguous request for an attorney. 183 Cal.Rptr.3d 784, 799 (Cal. Ct. App. 2015). In that case, officers arrested a 13-year-old boy, and advised him of his rights. *Id.* at 339. The police showed the boy footage of the murder for which he was tried, claiming that the murderer in the video was him, and questioned him about the footage. *Id.* at 341. After repeatedly denying that

the individual in the footage was him, the defendant told police "Could I have an attorney? Because that's not me." *Id.* Believing that the boy was referring to his right to counsel during criminal trials, the police answered with "You'll have the opportunity." *Id.* The court held that this was an unambiguous request for counsel. *Id.* at 799. The court noted that statements which were closer to "can I have a lawyer" tend to be unambiguous invocations of the right to counsel, while statements that were closer to "maybe I should talk to a lawyer" were too ambiguous. *Id.* at 799 n. 14 (quoting *Davis*, 512 U.S. at 462). Thus, the court held that the defendant had invoked his right to an attorney. *Id.* at 800.

In this case, the defendant's statement to the police was too unambiguous to be considered an invocation under *Davis*. 512 U.S. at 462. In this case, the defendant told the police "I'm just thinking, maybe I shouldn't say anything without a lawyer." When the police officer asked him to clarify, he said "On TV, they always get a lawyer." This statement is similar to the defendant's statement in *Davis*, where both defendants not only explicitly used the word 'maybe,' but indicated some sort of internal conflict as to whether they should request an attorney. *Id.* at 455. Much like the defendant in *Davis*, the defendant in this case did not make an unambiguous statement so as to make a reasonable officer certain that they were requesting an attorney. *Id.* at 462. Furthermore, the defendant's statement to the police was more ambiguous than the defendant's in *Roquemore*, where the court held that "Can I call a lawyer or my mom to talk to you?" was also too ambiguous to be an invocation for counsel. 31 Cal.Rptr.3d at 224. While that statement was deemed to be ambiguous, a clarifying question as to whether someone else could speak to the police is still more unequivocal than a defendant's internal conflict about whether they would like to have a lawyer present.

Furthermore, the defendant's statement to the police constitutes no certain request to have an attorney present. Unlike in the case of *In re Art T.*, where the defendant's statement "Could I have an attorney," would signal to a reasonable officer that they were asking for counsel, there is no certain request in this case. 183 Cal.Rptr.3d at 341. In this case, the defendant never asks the police officer for an attorney. The defendant, at most, states that he is uncertain as to whether he should speak without an attorney. This uncertainty is not enough to invoke the right to counsel. *Davis*, 512 U.S. at 459.

Since the defendant never asks for an attorney, and since the defendant never states that he wants an attorney, his statement to the police does not constitute an unambiguous or unequivocal statement. Thus, the defendant did not invoke his right to counsel.

II. The case law does not support the defense's contention that the defendant invoked his Constitutional rights.

For the defendant to invoke their right to counsel, they must leave no room for uncertainty, as a statement is either "an assertion of the right to counsel or it is not." *Smith v. Illinois*, 469 U.S. 91, 98 (1984). An officer must cease all questioning of the defendant only when the circumstances leading up to the request and the request itself leave no room for ambiguity. *See id.* However, the question as to whether a defendant has invoked his right to counsel is categorically distinct from whether they have waived their *Miranda* rights. *Id.* Such a distinction is meant to protect defendants, so that the police may not "wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance." *Id.* The waiver of those rights; however, may be inferred when considering "the particular facts and circumstances surrounding the case." *Id.* (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). However, once the defendant has invoked their right to counsel, subsequent statements and actions by the defendant are "relevant only to the question whether the accused waived the right

he had invoked." *Smith*, 469 U.S. at 98. Accordingly, the defendant's actions and statements prior to invoking the right to counsel may be relevant in determining ambiguity, but not subsequent actions and statements. *See id.* at 98-100.

A. The cases that the defense cites fail to support the contention that the defendant had invoked their right to counsel.

A defendant, after waiving their *Miranda* rights, may subsequently invoke their right to counsel. *Edwards*, 451 U.S. at 484 (1981). Such invocation; however, must be made sufficiently clear so that a reasonable officer would understand the statement to be an invocation of the right to counsel. *Davis*, 512 U.S. at 459. If a suspect makes "a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking their right to counsel" then cessation of questioning is not required. *Id.*

The defense cites *People v. Dingle* to support the claim that the defendant invoked his right to counsel. 219 Cal.Rptr. 707, 709 (Cal. Ct. App. 1985). In *Dingle*, the court held that the defendant's statement, "I think now that you told me what you think, I better talk to a lawyer," was a valid invocation of the right to counsel. *Id.* In that case, the defendant's statement to the police reflected no uncertainty or ambiguity, and instead evidenced a clear desire to have an attorney present. *See id.*

Furthermore, the defense distinguishes this case from *People v. Bacon* to support the claim that the defendant here invoked his right to counsel. 240 P.3d 204 (Cal. 2010). In that case, the defendant told the interrogating officer, "[y]eah, I think it'd probably be a good idea … for me to get an attorney." *Id.* at 224. In the same exchange, the defendant told the officer, "that's what you're gonna say. I mean talk to me okay?" *Id.* At that point, the officer was unsure

whether "talk to me" was a waiver of the right to an attorney, or whether he was asking the officer what he wanted him to do. *Id.* After confirming with the defendant, the officer understood it to be a waiver. *Id.* The court held that this confirmation made such a statement an unambiguous waiver; however, the court clarified that had the statement been ambiguous, it would not have been an invocation of the right to counsel anyway. *Id.* Thus, the court held that the defendant did not invoke his right to counsel because he did not make a clear and unambiguous request for an attorney. *Id.*

The defense analogizes to *Wood v. Ercole* to argue that the defendant here invoked his right to counsel. 644 F.3d 83, 87 (2nd Cir. 2011). In *Wood*, the court held that the defendant's statement to the police, "I think I should get a lawyer," coupled with the surrounding circumstances, was an invocation of the right to counsel. *Id.* In that case, the defendant told the police he wanted an attorney, and the officer responded by handing him a phone, and leaving the room. *Id.* The court acknowledged that it was possible for such a statement to be uttered in an uncertain or ambiguous way, but that the officer's subsequent actions foreclosed any doubt as to his understanding of the statement. *Id.* at 92. Furthermore, the court declined to hold that the defendant should have been more insistent or combative in demanding a lawyer, and instead held that the defendant's attempts at being polite did not render his invocation ambiguous. *Id.*

The defense also analogizes this case to *Sessoms v. Grounds* in order to argue that the defendant's statement to the police was unambiguous. 776 F.3d 615, 617 (9th Cir. 2015). In *Sessoms*, the defendant explicitly told the police "Yeah, that's what my dad asked me to ask you guys … uh, give me a lawyer." *Id.* In that case, the court went to great lengths to emphasize that the defendant could have said very little to make that statement more unambiguous than it already was. *Id.* at 627. While it is true that the defendant was requesting an attorney on the

advice of his father, this was not relevant to the court's decision, as there could be no other reasonable interpretation of that statement than that he wanted an attorney present. *Id.*

The defendant's statement here is closer to the ambiguous statement uttered in *Bacon*. 240 P.3d 204, at 221. The defense argues that the totality of the circumstances of the entire investigation is what rendered the statement ambiguous, and consequently, the statement here was unambiguous. However, the court in *Bacon* actually held that the totality of the circumstances of the exchange where the reference to an attorney was made is what made the statement ambiguous. *Id.* In *Bacon*, the defendant's previous statements and behavior outside of the exchange was not dispositive as to whether the defendant actually invoked his right to counsel. *Id.* Furthermore, the court held that even if the defendant's statement, "talk to me," could be reasonably interpreted in multiple ways, such ambiguity would not have allowed the statement to be considered a valid invocation. *Id.* In this case, the defendant's statements to the police could be reasonably interpreted in multiple ways. For instance, the defendant could have meant that getting an attorney might be a good idea because people on TV always get an attorney. Alternatively, defendant could have been internally questioning whether he should talk to an attorney. Both of these interpretations are more likely than the interpretation that he unequivocally and unambiguously requested counsel.

The defense argues that the defendant's statement here reflects a similar level of clarity as the statement in *Dingle*. 219 Cal.Rptr. at 707. However, the statement in this case is "maybe I shouldn't say anything without a lawyer," while the statement in *Dingle* was "I better talk to a lawyer." *Id.* The former statement reflects ambiguity and uncertainty. A reasonable officer, such as the interrogating officer in this case, would interpret the former statement to reflect an inner conflict in the mind of the defendant. Nothing about the statement indicates a clear desire for an

attorney. However, the statement in *Dingle* reflects glaring certainty. *Id.* In that statement, the defendant is making a clear choice that speaking to an attorney is what they would rather do. Furthermore, the defendant's statement here is far from the level of certainty than the statement in *Sessoms*. 776 F.3d at 627. The defendant's statement here could be reasonably interpreted to mean something other than that he wanted a lawyer. It is reasonable to interpret the defendant's statement here as a form of wondering aloud, or a reflection of inner conflict. In *Sessoms*, the court emphasized that there was only one reasonable interpretation, which was that the defendant wanted an attorney. *Id.*

Furthermore, the defense argues that the standard set forth in *Wood* should be applied in this case to read the defendant's statement as an unambiguous request for counsel. 644 F.3d at 87. However, the surrounding circumstances in this case are substantially distinct from the case in *Wood. Id.* In this case, the interrogating officer responded to the suspect's statement by asking what he meant. When the defendant responded "On TV, they always get a lawyer," the officer reasonably interpreted this statement to indicate that the defendant was taking legal advice from TV. Meanwhile, the officer in *Wood*, upon hearing the defendant request counsel, stopped speaking to the defendant, and handed him a phone. *Id.* at 87. In that case, the court expressed doubt that the statement could be reasonably interpreted as anything but a request for an attorney in the first place, but that any ambiguity was dispelled by the officer's response to the defendant's request. *Id.* at 92. In *Wood*, it was the officer's response that confirmed the clarity of the defendant's statement, but in this case, the officer's response demonstrates the ambiguity of this defendant's statement. *Id.*

Since the defendant's statements to the police do not reflect the requisite level of clarity to invoke the right to counsel, such statements should not be read as a clear invocation of the

right to counsel. Since the defense did not invoke his right to counsel, his confession to the police should be admitted.

B. The cases that the defense cites fail to rebut the fact that the defendant waived their right to counsel.

A defendant's express statement that they wish to proceed with interrogation without the assistance of an attorney followed closely by a statement would almost certainly constitute a waiver. *Miranda*, 384 U.S. at 475. Furthermore, a valid waiver will not be presumed merely from the fact that the defendant was silent, or that a confession was actually obtained. *Id.* However, an express statement is not "indispensable to a finding of waiver." *North Carolina v. Butler*, 441 U.S. 369, 373 (1979). In fact, the defendant's waiver "can be clearly inferred from the actions and words of the person interrogated." *Id.* However, once the defendant has invoked their right to counsel, the fact that the defendant continued to respond to police questioning is not enough to waive that right. *Edwards*, 451 U.S. at 484 (1981).

The defense cites *Dingle* to rebut a finding of waiver. 219 Cal.Rptr. at 707. In that case, the interrogating officers advised the defendant of his rights, and the defendant agreed to questioning. *Id.* After approximately two and a half hours of questioning, the defendant decided he wanted to answer no more questions, and invoked his right to counsel. *Id.* After the interrogating officer informed the officer in charge of the investigation, the latter officer confronted the defendant, and proceeded to interrogate him. *Id.* After relentlessly intimidating and badgering the defendant, the officer finally obtained a confession. *Id.* The defendant broke down crying, confessing to rape, murder, and arson. *Id.* The court held that the defendant's confession was inadmissible, because the second investigating officer purposefully and flagrantly disregarded the defendant's constitutional rights. *Id.* In light of this factor, the court

held that the defendant's confession to the police after invoking his right to counsel was not a waiver of that right. *Id.*

The defense cites *Martinez v. Cate* to rebut the fact that the defendant waived his *Miranda* rights. 903 F.3d 982 (9th Cir. 2018). In that case, the defendant was stipulated to have invoked his right to counsel. *Id.* at 993. The court held that because the defendant had invoked his right to counsel, and because the officer continued to interrogate the defendant after invoking that right, his responses to the interrogation could not be interpreted as valid waivers of the right to counsel. *Id.* In order for the defendant's subsequent statements to be inadmissible, the defendant would have needed to reinitiate communication with the officer himself, and have waived his *Miranda* rights voluntarily, knowingly, and intelligently. *Id.* at 996. Consequently, the court held that the defendant's confession was an inadmissible response to the officer's badgering and disregard of the defendant's *Miranda* rights. *Id.* at 997.

The defendant's responses to the interrogating officer in this case; however, should be interpreted as a valid waiver of their *Miranda* rights. In both *Martinez* and *Dingle*, the defendants responded to the officer's questions after validly invoking their right to counsel. *Id.*; 219 Cal.Rptr. at 707. In this case, the defendant did not validly invoke their right to counsel, and instead answered the officer's questions absent an invocation of that right. Since the defendant had not invoked his right to counsel, his responses to the officer's questions constitute a valid waiver of his *Miranda* rights. *See Berghuis* 560 U.S. at 386.

Since the defendant did not invoke his right to counsel, his responses to the officer's questions constitute a valid waiver of his *Miranda* rights. Since the defendant has no invoked his *Miranda* rights, his confession to the police should be admitted.

III. The interrogating officer here did not attempt to deprive the defendant of his Constitutional rights by discouraging him from invoking them, or minimizing their legal significance.

The primary protection afforded to defendants in interrogation is "the *Miranda* warnings themselves." *Davis*, 512 U.S. at 460. When a suspect indicates that they understand their rights as it has been explained to them, and proceeds to answer the police's questions, he has indicated he is willing to deal with the police unassisted. *Id.* When explaining a defendant's *Miranda* rights, the officer should not characterize the warnings as a "technicality" in order not to undermine the legal significance of those rights. *People v. Musselwhite*, 954 P.2d 475 (1998).

The defense analogizes this case to *Martinez* to argue that the officer here induced the defendant into waiving his rights. 903 F.3d at 996. In *Martinez*, the interrogating officer asked the defendant for his side of the story, and the defendant told the police that he wanted an attorney present before answering questions. *Id.* In response, the officer told the defendant that because he only has "one side of the story," he would have to book the defendant. *Id.* As a result, the defendant cooperated with the police. *Id.* The court held that such coercion was inadmissible, because the officer had badgered the defendant, and consequently, the admission was "at the authorities' behest." *Id.* at 998.

This case is substantially different from *Martinez*. *Id.* Here, the police officer did not threaten the defendant with booking if he invoked his right to an attorney, as the officer in *Martinez* did. *Id.* Furthermore, the police did not describe the *Miranda* warnings as a technicality, and ensured that the defendant understood his rights. The defense argues that the statement "you watch too much TV," was an attempt by the police to downplay the significance of those rights, but nothing in the record suggests anything coercive about this statement. The defendant had the ability to end interrogation at that moment by invoking his right to an attorney, but he did not. Moreover,

the defense cannot claim that the defendant did not understand his rights, because the defendant told the police he understood his rights.

Nothing in the record suggests that the police engaged in any prohibited trickery or coercion in inducing the defendant into waiving his rights. The defendant made an informed, knowing, and voluntary choice in speaking to the police unassisted.

CONCLUSION

Defense's motion to suppress the defendant's statement to the police should not be granted. The defendant waived his *Miranda* rights by answering the officer's questions, and never unambiguously and unequivocally invoked his right to an attorney during the questioning. Furthermore, the police never engaged in any prohibited conduct that would have deprived the defendant of his *Miranda* rights. The people respectfully request that the defense's motion be denied.

Applicant Details

First Name	**Miles**
Last Name	**Malley**
Citizenship Status	**U. S. Citizen**
Email Address	**mbm270@georgetown.edu**
Address	**Address** Street **2514 Ontario Road NW** City **Washington** State/Territory **District of Columbia** Zip **20009** Country **United States**
Contact Phone Number	**(202)-270-9885**

Applicant Education

BA/BS From	**University of Southern California**
Date of BA/BS	**May 2018**
JD/LLB From	**Georgetown University Law Center** **https://www.nalplawschools.org/employer_profile?FormID=961**
Date of JD/LLB	**May 22, 2023**
Class Rank	**School does not rank**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

Judge Sanchez,

I am writing to apply for a 2024-2025 clerkship with your chambers. I am open to any of the start dates. I am currently a 3L at the Georgetown University Law Center. After graduation, I will start as an associate at Fried Frank's office in Washington D.C., working in both the Litigation and Antitrust Departments.

I have wanted to pursue a clerkship since my 1L summer internship for Judge James E. Boasberg of the District Court for the District of Columbia. I thoroughly enjoyed seeing what I learned in my doctrinal classes come to life. I loved participating in the in-depth conversations between the clerks and the Judge in chambers. Most of all, however, I am appreciative of the invaluable lessons the experience taught me in legal research and writing.

This fall, I had the privilege of being one of the seven student interns at the Institute for Constitutional Law and Advocacy (ICAP), where I was able to continue honing my research and analytical skills while assisting with various Supreme Court and appellate matters.

I believe I can offer your office a strong work ethic, proven experiences with legal research and writing, and enthusiastic engagement on the issues. Further, my partner's family lives in Philadephia and it is my hope to eventually practice in the area.

I am enclosing my resume, transcript, and writing sample. Georgetown will submit my recommendations from Professors Shon Hopwood (Criminal Procedure), Musthaq Gunja (Evidence), and Kelsi Corkran and Mary McCord (ICAP) under separate cover. Additionally, Judge Boasberg (james_boasberg@dcd.uscourts.gov) and Charles Abbott of the District of Columbia Office of Human Rights (charles.abbott@dc.gov) have agreed to be references.

I would welcome the opportunity to interview with you and look forward to hearing from you soon.

Best,

Miles Malley
Candidate for Juris Doctorate 2023

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EDUCATION

Georgetown University Law Center — **Washington, DC**
Juris Doctor — May 2023
GPA: 3.73/4.00
Honors: Dean's List (2020-2021); Best Exam (Evidence, Fall 2021)
Activities: Executive Editor, Georgetown Journal of International Law; Research Assistant, Professor Shon Hopwood; Journal Write-On Judge; Tutor, Civil Procedure

University of Southern California — **Los Angeles, CA**
Bachelor of Arts in International Relations and Political Science — May 2018
Honors: Dean's List (Fall 2015, Fall 2016, Spring 2017, Fall 2017, Spring 2018)

EXPERIENCE

Institute for Constitutional Law and Advocacy (ICAP) — **Washington, DC**
Student Intern — September 2022 - December 2022

- Researched class representative substitution and post-certification factual development issues for a Ninth Circuit case
- Wrote memoranda on Supreme Court approach to intra-circuit splits
- Cite-checked Supreme Court amicus brief
- Maintained running dossiers with up-to-date information on potential defendants in public nuisance case

Fried, Frank, Harris, Shriver & Jacobson — **Washington, DC**
Summer Law Clerk - Litigation and Antitrust — May 2022 - August 2022

- Drafted Response to a Motion to Dismiss, Motion to Lift Stay, and Request for Production in patent litigation case
- Wrote several memoranda with regards to antitrust matter
- Drafted brief in affirmative asylum case

D.C. Office of Human Rights — **Washington, DC**
Office of the General Counsel Law Clerk — January 2021 - May 2021

- Drafted interrogatories and requests for production for variety of respondents
- Developed case theory for Interim Director on novel claim under D.C. discrimination laws
- Drafted Voluntary Compliance Agreements and responses to Motions to Dismiss and Requests to Reopen

The Honorable James E. Boasberg (D.C. D.C.) — **Washington, DC**
Legal Intern — May 2021 - August 2021

- Drafted judicial opinions on variety of issues, including: FOIA, Bill of Particulars, and Sovereign Immunity
- Wrote several bench memoranda with proposed disposition in preparation for motion hearings
- Cite-checked opinions

Teach for America — **New Orleans, LA**
Founding 5th Grade Math and Science Teacher — August 2019 - May 2020
Lead Third Grade English and Math Teacher — August 2018 - May 2019

- Developed and implemented math curriculum for Laureate Academy Charter School's first fifth-grade class which resulted in students outperforming district and state in rate of learning and mastery of subjects in end-of-year standardized tests
- Trained new Teach for America elementary-school teachers in greater New Orleans area

LANGUAGE SKILLS, CERTIFICATIONS, AND MISCELLANEOUS

- English (Native), French (Native)
- Certification in Elementary Education (Relay Graduate School of Education)
- LSAT Score: 174

Record of: Miles B. Malley
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Course Level: Juris Doctor

Entering Program:
Georgetown University Law Center
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Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2020							
LAWJ	001	21	Civil Procedure Kevin Arlyck	4.00	A	16.00	
LAWJ	002	21	Contracts Girardeau Spann	4.00	B	12.00	
LAWJ	005	20	Legal Practice: Writing and Analysis Erin Carroll	2.00	IP	0.00	
LAWJ	008	22	Torts Mary DeRosa	4.00	A-	14.68	

	EHrs	QHrs	QPts	GPA
Current	12.00	12.00	42.68	3.56
Cumulative	12.00	12.00	42.68	3.56

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2021							
LAWJ	003	22	Criminal Justice Shon Hopwood	4.00	A	16.00	
LAWJ	004	22	Constitutional Law I: The Federal System Paul Smith	3.00	A	12.00	
LAWJ	005	20	Legal Practice: Writing and Analysis Erin Carroll	4.00	B+	13.32	
LAWJ	007	92	Property Neel Sukhatme	4.00	A	16.00	
LAWJ	304	51	Legislation Caroline Fredrickson	3.00	A-	11.01	
LAWJ	611	07	Legal Innovation: Designing Human-Centered Solutions to Challenges in Law Jacklynn Pham	1.00	P	0.00	

Dean's List 2020-2021

	EHrs	QHrs	QPts	GPA
Current	19.00	18.00	68.33	3.80
Annual	31.00	30.00	111.01	3.70
Cumulative	31.00	30.00	111.01	3.70

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2021							
LAWJ	025	05	Administrative Law William Buzbee	3.00	B+	9.99	
LAWJ	165	09	Evidence Mushtaq Gunja	4.00	A	16.00	
LAWJ	215	09	Constitutional Law II: Individual Rights and Liberties Randy Barnett	4.00	A	16.00	
LAWJ	672	08	War Crimes, Terrorism and International Criminal Procedure Michel Paradis	2.00	A	8.00	

	EHrs	QHrs	QPts	GPA
Current	13.00	13.00	49.99	3.85
Cumulative	44.00	43.00	161.00	3.74

----------Continued on Next Column----------

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2022							
LAWJ	121	09	Corporations Michael Diamond	4.00	A-	14.68	
LAWJ	126	05	Criminal Law Alicia Washington	3.00	B+	9.99	
LAWJ	1491	14	Externship I Seminar (J.D. Externship Program) Christina Smith		NG		
LAWJ	1491	92	~Seminar Christina Smith	1.00	B+	3.33	
LAWJ	1491	94	~Fieldwork 3cr Christina Smith	3.00	P	0.00	
LAWJ	361	03	Professional Responsibility Michael Rosenthal	2.00	A-	7.34	

	EHrs	QHrs	QPts	GPA
Current	13.00	10.00	35.34	3.53
Annual	26.00	23.00	85.33	3.71
Cumulative	57.00	53.00	196.34	3.70

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2022							
LAWJ	038	07	Antitrust Law Jonathan Pitt	3.00	A-	11.01	
LAWJ	1601	01	Constitutional Impact Litigation Practicum (Project-Based Practicum) Mary McCord	5.00	A-	18.35	
LAWJ	178	07	Federal Courts and the Federal System Michael Raab	3.00	P	0.00	
LAWJ	317	01	Negotiations Seminar Robert Bordone	3.00	A	12.00	

	EHrs	QHrs	QPts	GPA
Current	14.00	11.00	41.36	3.76
Cumulative	71.00	64.00	237.70	3.71

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2023							
LAWJ	110	97	Copyright Law	3.00	A	12.00	
LAWJ	1396	97	Antitrust Law Seminar: Case Development and Litigation Strategy	3.00	A-	11.01	
LAWJ	1538	05	Constitutional Law: The First and Second Amendments Thomas Hardiman	1.00	P	0.00	
LAWJ	396	05	Securities Regulation	4.00	P	0.00	
LAWJ	885	09	Advocacy in International Arbitration	2.00	A	8.00	
LAWJ	967	08	National Security Law and the Private Sector	1.00	A-	3.67	

Transcript Totals

	EHrs	QHrs	QPts	GPA
Current	14.00	9.00	34.68	3.85
Annual	28.00	20.00	76.04	3.80
Cumulative	85.00	73.00	272.38	3.73

End of Juris Doctor Record

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

May 24, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am extremely pleased to write this letter of recommendation for Miles Malley, a 2L at the Georgetown University Law Center. I have known Miles for about six months, primarily as a student in my Evidence class. As his Evidence professor, I was able to observe Miles's analytical skills, observed his contributions to classroom discussions, and evaluated his writing. Based on my observations, I think Miles will make an excellent clerk.

Before I tell you a little bit about Miles, I should tell you a bit about the course in which he was enrolled. I teach Evidence a little differently than most professors. Instead of a traditional lecture class, my class is mostly problem based. I break the class up into small discussion groups several times a period, which gives me an opportunity to observe students' interactions and to help if students are struggling with a topic. In addition, I spend quite a bit of time using the Socratic method to tease out students' understanding of the material. This was the first class in-person after the pandemic and it was very helpful for me and the students to be able to have some of those small group discussions face to face and to be able to help students quickly who might have follow-up questions.

Miles was a superb contributor to the class. His enthusiasm for the material was clear and he dove into the assorted class problems with zeal. Over and over, Miles was able to dive a little deeper into the doctrine than the rest of his classmates and was able to uncover some of the underlying policy reasons for the Rules of evidence. His arguments demonstrated a sophistication that was advanced for the course.

Miles's exam performance was also stellar. In a class of 120 students, Miles's exam was one of the two best and he received the distinction of Best Exam in the class. I re-read his exam before writing this letter, and I was struck by the clarity of his writing and how quickly he was able to make his points. Not only did Miles excel in the issue-spotting portion of the exam, but he also was near-perfect on the part that had the students analyze policy prescriptions. It was an excellent exam overall, and I think it demonstrated that Miles is ready to write as a lawyer.

I was also able to spend a bit of time with Miles speaking about his career aspirations. Before coming to law school, Miles spent some time as a teacher in the Teach for America program. That background has inspired him to help solve some of the underlying inequities in our society. Miles is interested in a career in litigation and his facility with the Rules of Evidence seem to me to make him a future natural trial litigator. I think a clerkship will be particularly helpful to him in his career progression.

In short, I recommend Miles highly and without reservation. I am confident that his intelligence, his excellent writing skills, and his interest in trial work will make him a very good clerk. Please feel free to contact me if I can provide any additional information.

Sincerely,

/s/
Mushtaq Gunja
Adjunct Professor
Senior Vice President, American Council on Education
617-899-1862

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

May 24, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

We write to express our enthusiastic support for Miles Malley's application to serve as a law clerk in your chambers, based on Miles's performance in the Constitutional Impact Litigation Practicum-Seminar that we co-taught in the Fall of 2022. Miles's strong research and writing skills, solid work ethic, and collegiality would hold him in good stead in any judge's chambers.

The Practicum-Seminar is a 5-credit course that involves law students in the work of the Institute for Constitutional Advocacy and Protection (ICAP) at Georgetown Law. ICAP is a public interest law practice within the law school that pursues constitutional impact litigation in courts across the country. Over the course of the semester, Miles proved to be a valuable member of our team, providing key legal research and writing in support of numerous litigation matters. His work included researching state law for an amicus brief ICAP filed in the Supreme Court on behalf of Jewish community organizations, explaining why an Arkansas law prohibiting the practice of consumer boycotts of Israel by state contractors is inconsistent with the First Amendment; developing an amicus strategy for a Supreme Court matter involving Title IX sex discrimination; and, most significantly, drafting several substantive memoranda on the class action certification standards as relevant to a rehearing opposition brief we filed in the Ninth Circuit on behalf of a class of homeless individuals who successfully challenged a local ordinance that made it unlawful to rest in any public space within city limits. At the trial court level, Miles conducted important factual research in support of our lawsuit seeking to enjoin a private militia group from engaging in unlawful paramilitary and law enforcement activity.

In addition to his valuable work product, Miles showed his desire to learn as much as he could from his practicum experience. He was admirably proactive in seeking feedback on his work, even after the semester had ended, and he consistently provided thoughtful contributions to our weekly seminar. The seminar covers topics such as threshold barriers to constitutional litigation (standing, abstention, etc.), legal theories under different constitutional provisions (due process, equal protection, First Amendment, etc.), and strategic considerations in impact litigation, among other things. Miles was consistently well prepared and his contributions in these weekly discussions revealed his deep engagement with the material.

Together, we have clerked at all three levels of the federal judiciary and, based on that experience, we believe that Miles would be a welcome addition to any judge's chambers. He is hard-working, pleasant, and eager to both learn from and contribute to the judicial decision-making process. We anticipate an impressive legal career ahead for Miles.

We would be delighted to answer any further questions that you might have. Thank you for considering Miles's application.

Respectfully submitted,

Mary B. McCord, Executive Director & Visiting Professor of Law
mbm7@georgetown.edu

Kelsi Brown Corkran, Supreme Court Director & Senior Lecturer
kbc74@georgetown.edu

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

May 24, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing this letter with enthusiastic support for Miles Malley, who is applying for a clerkship in your chambers. Miles comes to you with proficiency in editing legal writing as my research assistance; and with experience in litigation, after having interned for U.S. District Court James E. Boasberg. But even beyond his legal abilities, Miles would make a wonderful clerk because of his maturity, attention to detail, and pleasant nature. Miles is the complete package, and he has my highest recommendation.

Miles was in my first-year Criminal Procedure class, and it was quickly apparent that his abilities set him apart from the other students in the class. While many students struggled with my reading assignments, Miles arrived prepared and always had comments that went deep below the surface of the cases we were studying. My Crim Pro exam that year was incredibly difficult, and yet Miles rose to the challenge.

I was so impressed with Miles analytical abilities on my exam and his thoughtful participation in class, that I then hired him as my research assistant. In that role, Miles has again shined. He is diligent and always sticks to the deadlines I impose. Miles is also someone who you want around chambers. He has been professional every time I have witnessed him working together with other students. As a result, I have hired him for a second year as my research assistant.

If you need any additional information, please do not hesitate to contact me.

Sincerely,

Shon Hopwood

Shon Hopwood - srh90@georgetown.edu

Miles Malley

War Crimes, Terrorism, and International Criminal Procedure Final Paper

(This paper has not been edited by an outside party)

In the Interests of Justice

Did the ICC Pre-Trial Chamber Abuse its Discretion in Denying the Office of the Prosecutor's 2017 Request to Initiate an Investigation into the Situation in Afghanistan?

On September 27, 2021, the International Criminal Court's (ICC) current prosecutor, Karim A.A. Khan QC, released a statement seeking authorization to resume investigation into the situation in Afghanistan.[1] *The statement drew attention to—and criticism for—Khan's decision to focus solely on crimes allegedly committed by the Taliban and the Islamic State Khorasan Province (and thus not focus on potential crimes committed by Afghan government forces and U.S. troops and intelligence agents).*[2] *Lost in the focus on Khan's prosecutorial discretion is concern as to why the investigation had to be resumed in the first place.*

In 2017, Fatou Bensouda, the then-Prosecutor of the ICC, requested judicial authorization from an ICC Pre-Trial Chamber (the necessary procedure under Article 15(3) of the Rome Statute of the ICC ["Rome Statute"]) to initiate an investigation into alleged crimes in Afghanistan committed by all relevant actors—specifically, the Taliban, the Afghan National Security Force, the U.S. military

[1] Press Release, ICC, Statement of the Prosecutor of the International Criminal Court (Sept. 27, 2021), https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-khan-qc-following-application.
[2] Gasia Ohanes, *ICC Under Fire for Seeking Afghanistan Probe without US Focus,* DW (Sep. 27, 2021), https://www.dw.com/en/icc-under-fire-for-seeking-afghanistan-probe-without-us-focus/a-59325722.

and the Central Intelligence Agency.[3] Bensouda, on behalf of the Office of the Prosecutor (OTP), sought to commence the investigation *proprio motu*, thus setting in action a different, more intrusive review by the Pre-Trial Chamber (PTC), as per the ICC's Rules of Procedure and Evidence (Rules) and the Rome Statute.

Rule 48 of the Rules dictates that "in determining whether there is a reasonable basis to proceed with an investigation under article 15, paragraph 3, the Prosecutor shall consider the factors set out in article 53, paragraph 1(a) to (c) ("Initiation of an Investigation"), and then "submit to the Pre-Trial Chamber a request for authorization of an investigation."[4] In turn, these factors are (a) whether there is a reasonable basis to believe a crime within the jurisdiction of the Court has been or is being committed; (b) that the case is or would be admissible under Article 17 and (c) whether there remains substantial reasons to believe that an investigation would not serve the interests of justice.[5]

In this instance, the PTC found that the requirements of jurisdiction and admissibility—the two preliminary matters the OTP considers—had been met.[6] However, for the first time in the ICC's history, on April 12, 2019, the PTC decided that the investigation would not serve the interests of justice, and thus denied the Prosecutor's request.[7]

This paper will argue that the real abuse of discretion was not that of the Khan, but instead that of the PTC that unanimously rejected the initial 2017 request to investigate alleged crimes in Afghanistan.

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[3] Press Release, ICC, Statement of the Prosecutor of the International Criminal Court (Nov. 20, 2017), https://www.icc-cpi.int/news/prosecutor-international-criminal-court-fatou-bensouda-requests-judicial-authorisation.
[4] International Criminal Court Rules of Procedure and Evidence, *opened for signature* Sep. 3, 2002, § 2 Rule 48.
[5] *Id.*
[6] Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, ICC-02/17, Opinion of Judge Mindua, ¶ 87 (Apr. 12, 2019).
[7] *Id.*, ¶ 96.

The PTC's reliance on the "interests of justice" provision represents an abuse of discretion in two ways. First, based on a plain understanding of the Rome Statute of the ICC and traditional modes of statutory construction, it seems unlikely that the PTC was allowed to conduct a review—much less a *de novo* review—of the Prosecutor's belief that the investigation was in the interests of justice. Second, even if such a review was appropriate, the PTC adopted a meaning of "interests of justice" distinct from the term's original meaning.

1. <u>The Pre-Trial Chamber was not Authorized to Review the OTP's Decision</u>

There is no doubt that a review of the "reasonable basis" and "admissibility" prongs of Article 53(1) is within the discretion of the Pre-Trial Chamber: Article 15(4) of the Rome Statute states that "if the Pre-Trial Chamber … considers that there is a *reasonable basis* to proceed with an investigation, and that the case appears to fall within the *jurisdiction of the Court*, it shall authorize the commencement of the investigation."[8] However, notably absent from this provision—and from all of Article 15—is any indication that the PTC is also authorized to review Article 53(1)(c) (i.e., the interests of justice provision). Under *expressio unius est exclusio alterius* (a maxim of interpretation meaning that the expression of one thing is the exclusion of another), this provision would seem to signal that the OTP's ruling regarding the interests of justice is not reviewable.[9]

Article 53(1) ends with the mandate that "if the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber."[10] While at first glance this may seem like an allowance to the PTC to review decisions based on the "interests of justice" subparagraph, the express language of the provision clarifies that this instruction applies only in cases where the

[8] G.A. Res. 51/207, Rome Statute of the International Criminal Court, Art. 15(4) (Jul. 17, 1998) (emphasis added) [hereinafter *Rome Statute*].
[9] *See generally* Clifton Williams, *Expressio Unius Est Exclusio Alterius*, 15 MARQUETTE L.J. 191 (1931).
[10] Rome Statute, Art. 53(1).

prosecutor decides *not* to prosecute. The same construction is seen in Article 53(3)(b): "the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1(c)."[11]

In short, both provisions suggest that only a 'negative' decision based on the interests of justice by the OTP is subject to review by the PTC. A different ICC Pre-Trial Chamber (Pre-Trial Chamber II regarding the Situation in the Republic of Kenya) has itself found this formulation convincing, holding that it "*is only when the Prosecutor decides that an investigation would not be in the interests of justice* that he or she is under the obligation to notify the Chamber of the reasons for such a decision, *thereby triggering the review power of the Chamber.*"[12]

Indeed, if the PTC were expected to review subparagraph (c), as with subparagraphs (a) and (b), then the provisions at the end of Articles 53(1) and in 53(3)(b) would be redundant, for any decision by the Prosecutor would already be reviewable—and the canon against surplusage teaches us that no part of a statute should be read in a way that renders it redundant.[13] In sum, the plain language of the Rome Statute, as well as various canons of statutory constructions, all suggest that the PTC engaged in an abuse of discretion in reviewing the OTP's determination that the investigation would be in the interests of justice.

Further, the PTC's judgment was misguided in yet another respect. Even if the PTC was entitled to review the OTP's Article 53(1)(c) judgment, its interpretation of the provision diverts from the term's statutory meaning.

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[11] *Id.*, Art. 53(3)(b).
[12] Decision Pursuant to Art 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya, ICC-01/09, Opinion of Judge Trefandafilova, § 63 (Mar. 31, 2010) (emphasis added).
[13] *See, e.g.,* Charlie D. Stewart, *The Rhetorical Canons of Construction: New Textualism's Rhetoric Problem*, 116 MICH. L.J. 1485, 1496-7 (2018).

2. The Pre-Trial Chamber was not Faithful to the Original Meaning of "Interests of Justice"

In establishing the three elements the OTP should consider in Article 53(1), the Rome Statute lists the first two (whether the information provides a reasonable basis to believe a crime was committed and whether the case is admissible under article 17) in the affirmative, suggesting that both of these components must positively be found prior to the initiation of an investigation.[14] By contrast, 53(1)(c) is written in the negative ("taking into account the gravity of the crime and the interests of the victims, there are nonetheless substantial reasons to believe that an investigation would *not* serve the interests of justice").[15] The plain language of the statute therefore suggests that, unlike with the first two elements, the Prosecutor "is not required to establish that an investigation or prosecution is in the interests of justice. Rather, he [or she] shall proceed with investigation unless there are specific circumstances which provide substantial reasons to believe it is not in the interests of justice to do so at that time."[16] In other words, when the PTC found that "it is unlikely that pursuing an investigation would result in" advancing the interests of justice,[17] they were looking for evidence where none was required.

Moreover, even assuming that a positive determination was required, the factors the Pre-Trial Chamber considered in their decision are likely outside the intended scope of Article 53(1)(c).

In its opinion, the PTC held that "an investigation would only be in the interests of justice if prospectively it appears suitable to result in the effective investigation and subsequent prosecution of cases within a reasonable time frame."[18] In short, above all else this Pre-Trial Chamber seems to consider the *feasibility of an investigation* to be the paramount concern when determining whether an investigation is in the interests of justice. They stress the "scarce cooperation" the Prosecutor was

[14] Rome Statute, Art. 53(1).
[15] *Id.*, Art. 53(1)(c).
[16] Office of the Prosecutor, ICC, Policy Paper on the Interests of Justice (Sep. 2007).
[17] OPINION OF JUDGE MINDUA, *supra* note 6, ¶ 96.
[18] *Id.*, ¶ 89.

obtaining from the countries in question, the length of the preliminary examination (due, in large part, to the lack of relevant cooperation), to demonstrate that an investigation would likely prove futile.[19] There are both legal faults with, and adverse policy consequences to, this approach.

The closest the Rome Statute comes to defining "interests of justice" is in Article 53(2)(c), where it states that the OTP can find that "a prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims, and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime."[20] While this helps clarify what the term encompasses, it does not adequately define what it means for a prosecution to be, or, rather, not to be, in the interests of justice, so as to provide the OTP, the Pre-Trial Chamber, or the casual reader with an understanding of when a reliance on the provision would be appropriate. However, there are certain meanings of the term that both a facial reading of the provision and various modes of statutory constructions make clear.

First, consider the elements Article 53(2)(c) lists as potentially playing a role in finding that an investigation is not in the interests of justice. The considerations listed here fall into two categories: the first two concern the victim, and whether or not they would need or want an investigation (the gravity of the crime and the interests of the victims), and the second two concern the perpetrator, and the extent—or lack thereof—of their guilt (age or infirmity of the perpetrator and his or her role in the alleged crime). Absent from these considerations is anything involving the feasibility or difficulty of the investigation itself, notwithstanding the interests of the victims or the guilt of the alleged perpetrator. It is true, though, that these considerations listed in 53(2)(c) follow the word "including", demonstrating that these express factors are not the only ones the prosecutor—and thus the PTC—may consider in making their determinations.

[19] *Id.*, ¶ 89.
[20] Rome Statute, Art. 53(2)(c).

The doctrine of *ejusdem generis,* meaning "of the same kinds, class or nature", however, tells us that a general descriptor (in this case "including") are "usually to be restricted to… things of the same kind or class with those specifically named in the preceding words."[21] The feasibility of an investigation because of a lack of cooperation on the part of alleged criminals, does not fit in either of the "classes" delineated above (the interests of the victims and guilt-level of the perpetrator). Thus, while the word "including" does clarify that the Pre-Trial Chamber is not limited to the factors listed in Article 53(2)(c), it does not allow the PTC to include any other factor it sees fit that has no relation to the ones listed.

Further, the Vienna Convention on the Law of Treaties (otherwise known as the "Treaty of Treaties", this document remains an authoritative guide in interpreting international treaties), provides useful instruction on how to give meaning to a potentially ambiguous term. Specifically, Article 31, entitled The General Rule of Interpretation, requires that:

> "1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose; 2) The context for the purposes of the interpretation shall . . . [include] its preamble and annexes." [22]

In this case, the preamble of the Rome Statute, the part of the statute most representative of its purpose, makes its meaning clear—one at odds with the definition of "interests of justice" given by the PTC. Specifically, the preamble affirms that the Statute was created with the intent of putting an end to the impunity of the perpetrators of the most serious crimes ("the most serious crimes of concern to the international community as a whole must not go unpunished and … their effective prosecution must be ensured.").[23] The OTP itself shared this understanding in its *Policy Paper on Preliminary Examinations,* finding that "in light of the mandate of the Office and the object and

[21] City of Lexington v. Edgerton, 159 S.W.2d 1015 (1941).
[22] G.A. Res. 2166, Vienna Convention on the Law of Treaties, Art. 31 (May 23, 1969).
[23] Rome Statute pmbl.

purpose of the Statute, there is a strong presumption that investigations and prosecutions will be in the interests of justice".[24] Put differently, the assumption prior to this PTC's report was that the prosecution of serious international crime was *by its very nature* in the interests of justice.

Understood in light of the Statute's purpose—gleaned from its unambiguous and ambitious preamble—"in the interests of justice" does not mean that a perpetrator can escape punishment and prosecution because of feasibility concerns, especially concerns predicated in large part on the accused's lack of cooperation.

Policy considerations also suggest the ICC reject such an understanding of "interests of justice". Weighing the lack of cooperation from alleged perpetrators *against* initiating an investigation would create a perverse incentive—one where it would be in the interests of the states or individuals in question to be as uncooperative as possible. Or, as the OTP previously explained, "weighing feasibility as a separate self-standing factor … might encourage obstructionism to dissuade ICC intervention."[25] In fact, a decision that encourages actors to encumber a potential ICC investigation would be absurd—and, under the doctrine against absurdity, such an interpretation cannot hold.

Rather, as Human Rights Watch (HRW) advocates, the ICC "should adopt a strict construction of the term 'interests of justice'" in order to be consistent with the purpose of the Rome Statute and to advance sensible policy goals.[26] For HRW, this includes some of the factors listed within Article 53(b)(c), as well as others that fit within the relevant categories, such as the age/infirmity of the alleged perpetrator, the amount of premeditation and/or planning, the number of—and ramifications to—the victims, etc.[27] These are all considerations that would not cut against the ICC's mission—as it would still be investigating and prosecuting the most heinous international

[24] Office of the Prosecutor, ICC, Policy Paper on Preliminary Examinations, at 13 (Nov. 3, 2013).
[25] *Id.* at 17.
[26] *The Meaning of "the Interests of Justice" in Article 53 of the Rome Statute*, HUMAN RIGHTS WATCH (Jun. 1, 2005), https://www.hrw.org/news/2005/06/01/meaning-interests-justice-article-53-rome-statute.
[27] *Id.*

crimes—nor would it create a regrettable incentive structure. Moreover, these are all considerations that actually fit within traditional notions of "justice"—for example, if a young actor acted without premeditation in a manner that did not cause harm to many victims, the ICC could reasonably find that the interests of justice weighed against prosecution even if reasonable basis and admissibility were found.

3. Now What?

The Pre-Trial Chamber overstepped its mandate in denying the OTP's request to initiate an investigation into Afghanistan. This much seems certain. The more daunting question, however, is why? Why, after years of essentially ignoring the "interests of justice" provision, where neither the Prosecutor nor a Pre-Trial Chamber used it once to reject an investigation, did this PTC rely on it to thwart a potential investigation into the situation in Afghanistan? Many believe, unfortunately, that the real reason is nothing more than coercive politics.

After the OTP's request to initiate an investigation—one that would include the U.S. military and the CIA—the Trump administration launched a vicious public attack on the ICC. Beyond publicly denouncing the court's legitimacy and authority (then-National Security Advisor John Bolton admonished the court as "illegitimate" and a "threat to American sovereignty"),[28] the administration authorized economic and travel sanctions against all ICC employees involved in the investigation, including freezing assets of the employees and prohibiting them and their families from visiting the U.S.[29] In the eyes of some, "the court's language [left] little doubt that the U.S. attack on the ICC and its personnel served as the crux of its decision."[30] That sentiment was only

[28] Zachary Basu, *John Bolton slams International Criminal Court as "illegitimate",* AXIOS (Sep. 10, 2018), https://www.axios.com/john-bolton-international-criminal-court-illegitimate-014f75f3-6ced-4f95-be04a9c77bfb9234.html.
[29] Lesley Wroughton, *U.S. imposes visa bans on International Criminal Court Investigators – Pompeo*, REUTERS (Mar. 15, 2019), https://www.reuters.com/article/uk-usa-icc/u-s-imposes-visa-bans-on-international-criminal-courtinvestigators-pompeo-idUSKCN1QW1ZH.
[30] Sara L. Ochs, *The United States, the International Criminal Court, and the Situation in Afghanistan*, 95 ELON L.J. 89, 91 (2019).

reaffirmed when the Trump administration received the PTC's decision by characterizing it as a "major international victory".[31]

This is ultimately the problem with an ill-defined concept such as "interests of justice". Terms that seem like they may mean nothing can, paradoxically, be used to justify anything. The Pre-Trial Chamber could not refute the OTP's determinations that there was a reasonable basis to believe a crime had been or was being committed or that the case was admissible under Article 17. It thus broadened the scope of their power to review the Prosecutor's decision and went beyond any reasonable meaning of the "interests of justice" and eventually rejected what most in the international legal community felt was a sensible request.

In its decision, the PTC stressed that the court's "legitimacy" was "at stake" if they embarked on an ultimately frivolous investigation. The opposite was true—the sense that the judges bent the knee to political pressure from the U.S. damaged the court's legitimacy.

All this demonstrates the need for a stricter, clearer, definition of "interests of justice" as well as a more delineated outline for when the PTC is authorized to review the Prosecutor's "interests of justice" decision. Without it, nothing will stop Pre-Trial Chambers in the future from acting based on political considerations—or, at least, from acting in a way that has the appearance thereof—and perhaps irreparably damaging the Court's legitimacy in the process. In the actual interests of justice, such a consequence cannot stand.

[31] Carol Morrello, *Trump administration applauds international court's decision to abandon Afghan war crimes probe*, THE WASHINGTON POST (Apr. 12, 2019), https://www.washingtonpost.com/world/national-security/trumpadministration-applauds-international-courts-decision-to-abandon-afghan-war-crimes-probe/2019/04/12/610fd2b65d4a-11e9-a00e-050dc7b82693_story.html.

Applicant Details

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Citizenship Status	**U. S. Citizen**
Email Address	**smarberr@samford.edu**
Address	**Address** Street **2453 RIDGEMONT DR** City **HOOVER** State/Territory **Alabama** Zip **35244** Country **United States**
Contact Phone Number	**4702924734**

Applicant Education

BA/BS From	**Kennesaw State University**
Date of BA/BS	**May 2021**
JD/LLB From	**Cumberland School of Law, Samford University** **http://cumberland.samford.edu/**
Date of JD/LLB	**May 1, 2024**
Class Rank	**50%**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**

Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Woodham, Matt
mwoodham@samford.edu
Butler, Kevin
kevin_butler@fd.org
(205) 208-7170
Cockrell, John
John_Cockrell@fd.org
This applicant has certified that all data entered in this profile and any application documents are true and correct.

S O P H I A M . M A R B E R R Y

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May 24, 2023

The Honorable Juan R. Sánchez
United States District Court, Eastern District of Pennsylvania
14613 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106
Courtroom 14-B

Dear Judge Sánchez:

I am a rising third-year student at Cumberland School of Law, expecting my degree in May 2024. I am writing to express my enthusiasm and interest in a 2024-2025 clerkship in your chambers. I believe my education and background make me an ideal candidate for this role, and I am confident that I could be an asset to your chambers. I am especially interested in a clerkship with your chambers because of your fourteen years of experience as a public defender at the Chester County Public Defender's Office, your prioritization of jury diversity in the Eastern District of Pennsylvania, and the general reputation you have established as a judge that seeks justice, equality, and fairness.

Enclosed please find my resume, unofficial law school transcript, undergraduate transcript, writing sample, and letters of recommendation from the following:

- Federal Public Defender Kevin Butler, Kevin_Butler@fd.org
- Assistant Federal Public Defender John Cockrell, John_Cockrell@fd.org
- Professor Matt Woodham, mwhoodham@samford.edu

While working at the Federal Public Defender's Office for the Northern District of Alabama, I have gained insight into the federal justice system and have been exposed to various legal issues. For example, I have researched the relationship between the Federal Sentencing Guidelines and the commentary, and whether the commentary has controlling weight. I have also explored the effect asylum claims and necessity-based defenses could have on illegal reentry cases. This experience gives me a solid foundation to build upon as your clerk, as I have improved upon my drafting of motions and memoranda and have gained valuable insight shadowing attorneys in court.

More broadly, as a legal intern and extern, my supervisors have continuously recognized my diligence and attention to detail. I also have a strong academic background in research and legal writing, as demonstrated by my performance at Cumberland and in my previous internships at the Federal Public Defender's Office and the Jefferson County Public Defender's Office.

On a personal note, I have also been in recovery since October 2015, and since then, my life has continued to move in an upward trajectory. Recovery requires honesty, strength, resiliency, and hard work. These qualities will help me to excel as your clerk. As will my ability to learn quickly, work thoroughly, and act professionally.

This summer, I have secured employment at Jefferson County Public Defender's Office and, alongside retired Chief Justice Sue Bell Cobb, at Redemption Earned. Thank you for your time and consideration.

Sincerely,
Sophia Marberry
Sophia Marberry

S O P H I A M. M A R B E R R Y

2453 RIDGEMONT DRIVE • HOOVER, ALABAMA 35244

(470) 292-4734 • SMARBERR@SAMFORD.EDU

EDUCATION

Samford University, Cumberland School of Law, Birmingham, AL
Juris Doctor expected, May 2024
GPA: 3.08
Activities: Phi Alpha Delta, American Constitution Society, Cumberland Public Interest and Community Services, and Alabama Student Bar Association

Kennesaw State University, Kennesaw, Georgia
Bachelor of Science in Political Science (Minor: Criminal Justice) magna cum laude, May 2021
GPA: 3.71
Honors: President's List (4 semesters), Dean's List (3 semesters)

EXPERIENCE

Jefferson County Public Defender's Office — Birmingham, AL
Intern / extern — July - November 2022

- Collaborated with attorneys in representing indigent defendants in misdemeanor, juvenile, & felony cases
- Aided in the preparation of an NGRI defense for a client charged with attempted murder
- Interacted with clients currently participating in one of the Jefferson County Court's diversion programs, specifically Drug Court and Mental Health Court

Office of the Federal Public Defender's Office — Birmingham, AL
Intern / extern — June 2022 & present

- Attended various hearings, including initial appearances, change of plea, bond revocation, and final sentencing and visited with clients at the Talladega County Jail, Pickens County Jail, Hoover City Jail, and Cullman County Jail
- Drafted a motion to suppress all evidence seized and obtained by law enforcement officers because the investigatory stop was unlawful due to officers' lack of reasonable suspicion and drafted a motion to suppress all un-Mirandized custodial statements
- Ensured that there were no errors or discrepancies in the pre-sentence reports and helped identify if there were any mitigating factors to present to a judge before sentencing

J.M. Huber — Atlanta, GA
Shadow Experience with the General Counsel — 2022

- Observed a quarterly regulatory council meeting and gained invaluable legal knowledge on a variety of topics including patent infringement, securities & regulations, employment law, and international trade
- Participated in Mine Safety Health Administration training at Marble Hill

Woodstock P.D. Ride-along Program — Woodstock, GA
Participant — 2018, 2019

- Accompanied officers during their shifts to better understand their duties, objectives, goals, and experiences

SERVICE AND INTERNATIONAL MISSIONS

MUST Ministries — Smyrna, GA
Volunteer — 2018

International Missions — Haiti, Peru, Uganda
Missionary — 2009, 2010, 2011

TRANSCRIPT OF ACADEMIC RECORD
OFFICIAL

Samford University
800 Lakeshore Drive, Birmingham AL 35229
Phone 205-726-2911 Fax 205-726-2908

Record of: Sophia M Marberry
Level: Law

Issued To: SOPHIA MICHELLE MARBERRY

Date Issued: 03-JUN-2023
Date of Birth: 12-AUG
Student ID: 900298457
Student SSN: *****5889

Prior Degree: BS Kennesaw State University 2021-05-01 00:00:00

Course Level: Law

Primary Program
Juris Doctor
Program : Juris Doctor
College : Cumberland School of Law
Major : Law

Comments:
FIRST REGISTRATION DATE: 08/16/2021
6/6 Credits of Experiential Learning Satisfied
Law Writing Requirement Satisfied

INSTITUTION CREDIT:

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
Fall 2021						
LAW	502	Torts	4.00	B-	10.80	
LAW	506	Contracts I	3.00	B-	8.10	
LAW	508	Civil Procedure I	2.00	B-	5.40	
LAW	510	Criminal Law	3.00	B+	9.90	
LAW	512	Lawyering/Legal Reasoning I	3.00	B+	9.90	
		Ehrs: 15.00 GPA-Hrs: 15.00 QPts:	44.10	GPA:	2.94	
Spring 2022						
LAW	505	Real Property	4.00	B-	10.80	
LAW	507	Contracts II	2.00	B+	6.60	
LAW	509	Civil Procedure II	3.00	B-	8.10	
LAW	513	Lawyering/Legal Reasoning II	3.00	A-	11.10	
LAW	524	Evidence	3.00	B+	9.90	
		Ehrs: 15.00 GPA-Hrs: 15.00 QPts:	46.50	GPA:	3.10	
Fall 2022						
LAW	522	Constitutional Law I	2.00	C+	4.60	
LAW	526	Business Organizations	4.00	B	12.00	
LAW	799	AL Criminal Pract & Proc	3.00	A-	11.10	
LAW	800	Basic Skills in Trial Advocacy	3.00	B	9.00	
LAW	906	Externship I	1.00	A	4.00	
LAW	914	Govt Agency Externship I	2.00	P	0.00	
		Ehrs: 15.00 GPA-Hrs: 13.00 QPts:	40.70	GPA:	3.13	

********** CONTINUED ON NEXT COLUMN **********

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
Institution Information continued:						
Spring 2023						
LAW	523	Constitutional Law II	3.00	B-	8.10	
LAW	546	Prof Responsibilities	2.00	B	6.00	
LAW	665	Criminal Procedure I	3.00	B	9.00	
LAW	712	Jury Selection	2.00	B+	6.60	
LAW	745	Bioethics and the Law	3.00	A	12.00	
LAW	915	Govt Agency Externship II	2.00	P	0.00	
		Ehrs: 15.00 GPA-Hrs: 13.00 QPts:	41.70	GPA:	3.20	
Last Standing: Good Standing						
Fall 2023						
IN PROGRESS WORK						
LAW	533	Secured Transactions	3.00	IN PROGRESS		
LAW	540	Wills, Trusts and Estates	3.00	IN PROGRESS		
LAW	613	Advanced Evidence	2.00	IN PROGRESS		
LAW	662	Domestic Relations	3.00	IN PROGRESS		
LAW	799	Health Care Fraud and Abuse	2.00	IN PROGRESS		
LAW	804	Advanced Skills/Trial Adv	3.00	IN PROGRESS		
		In Progress Credits 16.00				

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	60.00	56.00	173.00	3.08
TOTAL TRANSFER	0.00	0.00	0.00	0.00
OVERALL	60.00	56.00	173.00	3.08

********** END OF TRANSCRIPT **********

1

Jeremy Dixon, University Registrar

800 Lakeshore Drive
Birmingham, AL 35229
samford.edu
samford.edu/law

Matt Woodham
Assistant Professor of Law and Interim Director of Advocacy Programs
Cumberland School of Law

May 24, 2023

The Honorable Juan R. Sánchez
United States District Court, Eastern District of Pennsylvania
14613 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106
Courtroom 14-B

Dear Judge Sánchez :

I write to offer my unqualified recommendation of Sophia Marberry to serve as a clerk in your chambers. I was a criminal defense attorney for six years before joining the faculty at the Cumberland School of Law, where I teach Evidence, Basic Skills in Trial Advocacy, Alabama Criminal Practice and Procedure, and Criminal Law. Typically, I also serve as the Assistant Director of Trial Advocacy, though I am acting as the Interim Director of Advocacy Programs for the 2022-2023 academic year.

In her first year of law school, Ms. Marberry was a student in my Evidence class. Her work ethic and intellect were apparent from the first day of class. She was a regular participant in class and outside of it during my office hours. She also holds a unique place in my history as a professor as the first student to ask a question that truly stumped me. I will spare you the details of the evidentiary issue, but Ms. Marberry's question evidenced a curiosity, creativity, and intelligence that will serve her well as a lawyer.

In her second year of law school, Ms. Marberry elected to take two of my experiential courses: Basic Skills in Trial Advocacy and Alabama Criminal Practice and Procedure. In those courses, Ms. Marberry learned the legal principles at play at every stage of litigation. Ms. Marberry further put that knowledge to work in experiential simulations such as preliminary hearings, competency hearings, client counseling, trials, and sentencing hearings.

In each of those classes, Ms. Marberry excelled. In addition to her work ethic and intelligence, I believe her success is also thanks in large part to her possessing a striking drive and maturity. Some of my students appear to approach law school as merely a means of attaining a degree—and they seek out the easiest path to do so. Conversely, Ms. Marberry has always struck me as being deeply motivated to use her time in law school to truly learn the skills needed to be an effective advocate for others. This motivation will be an invaluable asset to her future clients and employers.

I hope you will consider Ms. Marberry for a position with the Court. I can say without hesitation that she would be a wonderful addition to your chambers.

Sincerely,

Matt Woodham

OFFICE OF THE FEDERAL PUBLIC DEFENDER
NORTHERN DISTRICT OF ALABAMA

BIRMINGHAM OFFICE
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Huntsville, Alabama 35801
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F: (256) 519-5948

KEVIN L. BUTLER
Federal Public Defender

May 24, 2023

Honorable Juan R. Sánchez
United States District Court, Eastern District of Pennsylvania
14613 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106
Courtroom 14-B

RECOMMENDATION FOR SOPHIA MARBERRY

Dear Judge Sánchez:

I wholeheartedly recommend Sophia Marberry for a term clerkship with your chambers. Sophia's intellectual curiosity, proactive work ethic, and wonderful personality make her an outstanding addition to your staff.

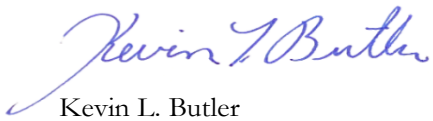
Sophia spent six weeks with us as a summer intern, and she quickly distinguished herself. Because of her outstanding work and commitment to our office mission, she is the only intern we invited back as a spring intern. Sophia doesn't just complete the assignments given her. She thoroughly reviews all documents and information in each case she is working on. Therefore, her work product goes beyond addressing the single issue assigned. It encompasses and addresses how the issue may impact the overall litigation strategy. Because of her intellectual curiosity, thoroughness, and understanding of case strategy, Sophia quickly becomes an integral part of the case team.

Additionally, Sophia doesn't just wait for specific assignments from her intern supervisor or assigned attorney. She proactively monitors and reviews the cases that come into our office. As a result of her proactive nature, during attorney meetings, Sophia is able to provide beneficial input in all of our cases. Unlike most of our interns who wait for a specific assignment, Sophia identifies litigation issues, proposes litigation strategies and asks what she can do to further the team's goals.

Sophia is a joy to have in our office. She gets along well with everyone and has an optimistic attitude. Her enthusiasm for the office mission has a positive effect on those around her. She asks to accompany attorneys to any court hearings or client visits that her schedule will allow. She joins in impromptu case discussions as they break out in the office, and as a result she has become even more a part of those case teams.

In sum, Sophia has been a wonderful addition to our office. She is a bright and dedicated law student who takes great care in her work. She would be a superb addition to any office, including your chambers, and I recommend her with the highest confidence.

Sincerely,



Kevin L. Butler
Federal Public Defender
Northern District of Alabama

OFFICE OF THE FEDERAL PUBLIC DEFENDER
NORTHERN DISTRICT OF ALABAMA

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F: (256) 519-5948

KEVIN L. BUTLER
Federal Public Defender

May 24, 2023

The Honorable Juan R. Sánchez
United States District Court, Eastern District of Pennsylvania
14613 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106
Courtroom 14-B

RE: Sophia Marberry

Dear Judge Sánchez,

I am writing to recommend Sophia Marberry for a term clerkship in your chambers. I have known Sophia since last Summer, and I have worked with her on several projects during her internships with my office. I have also had numerous conversations with her and served as a mentor of sorts. In that time, I have seen Sophia's work ethic and her commitment to the profession. Sophia's drive to learn, as well as her strong sense of ethics, would be assets to your chambers.

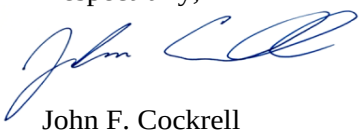
Because of the tremendous variety of cases in federal court, a judicial clerk must be well-rounded and able to assess cases involving a wide range of issues. I believe Sophia can learn new areas of law quickly. When I first met her, the first thing that I noticed about her was how inquisitive she was. It was clear that she was here to learn. A big part of her role in our office has been to do legal research. She has researched suppression issues, possible defenses to federal criminal charges, and immigration consequences of federal convictions, among others. Beyond just research, however, Sophia also asks many practical questions to understand how things work.

I have found Sophia to be driven to absorb and learn everything she can, so she can be the most well-rounded lawyer that she can.

Sophia also has a strong sense of ethics. She once called me to ask my advice about an ethical dilemma. As we talked through this issue together, I was impressed by her willingness to make a principled stand and her independence of mind—two traits I hold in high regard. I also feel that Sophia's recovery is an integral part of her story and her motivations. Many of our clients have substance-use disorders, and Sophia's experiences drive her to help others going through similar things.

For these reasons, as well as Sophia's personable nature, I believe she would be a welcome addition to your chambers. I hope that you will consider her for this opportunity.

Respectfully,



John F. Cockrell
Assistant Federal Public Defender

S O P H I A M . M A R B E R R Y

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WRITING SAMPLE 1

The attached writing sample is a legal memorandum I drafted as an assignment as an extern at the Federal Public Defender's Office for the Northern District of Alabama. Before writing this memorandum, I was informed that this client had been charged with two counts of felon in possession and one count of stealing a firearm related to an incident where he got into an altercation with a state trooper and took the trooper's gun. I was also told that this client had recently been evaluated and suffers from untreated PTSD related to a prior incident in which he was shot at by a different state trooper. Lastly, I was told that this client has indicated wanting to go to trial.

Based on the above, I was asked by one of the Assistant Federal Public Defenders to research (1) whether an insanity defense could be raised, (2) whether there was a justification/self-defense argument based on the client's PTSD causing him to perceive the situation in a way that made him believe he was in danger, even though objectively he was not, and (3) whether a diminished capacity defense based on his PTSD could be raised.

After researching these issues, I concluded that the only viable defense was an insanity defense. And after communicating this to the Assistant Federal Public Defender, I was asked to draft a memorandum specific to the insanity defense alongside any recommendations, etc. I performed all of the research, and this work is entirely my own. I am submitting the attached writing sample with the permission of the Federal Public Defender's Office. All identifying information has been redacted to protect client confidentiality.

WRITING SAMPLE 2

The attached writing sample is an excerpt of the Appellate Brief I drafted in my second semester Legal Research and Writing course. Due to the length of the original brief, the sample includes only the Argument section.

For purposes of this assignment, I argued on behalf of Nancy Johnson, the Plaintiff-Appellant. The purpose of the brief was to challenge the district court's summary judgment based on (1) its conclusion that the undisputed evidence established that Johnson's position was subject to the administrative exemption under the Fair Labor Standards Act and (2) its conclusion that Johnson's claim was barred by the two-year statute of limitations. I conducted all the research necessary for the assignment.

MEMORANDUM

To: [redacted]

From: Sophia Marberry

Re: [redacted] **– insanity defense**

Date: February 24, 2023

QUESTION PRESENTED

Under federal law, does [redacted] have an insanity defense based on his untreated PTSD stemming from a prior incident in 2008 where [redacted] was shot at by a state trooper, and his criminal conduct in 2019 that gave rise to the current charges, where he took and possessed a different state trooper's gun?

BRIEF ANSWER

It remains unclear as to whether the court would find that [redacted] untreated PTSD meets the test for insanity under 18 U.S.C. § 17(a). While PTSD has not been disqualified by federal courts as a sole basis for insanity, the defense has not been very successful at trial. In prior cases, most courts have rejected this specific defense when there was insufficient evidence to establish that the PTSD was directly connected to insanity. For this reason, I think the only way the court may find that there is sufficient evidence to satisfy the test for insanity under 18 U.S.C. § 17(a) would be if additional experts could provide a report with more compelling language that the courts look for (ex: "severe" PTSD) or if [redacted] is willing to amend her written report and oral testimony so that it satisfies [redacted] burden of proof by "clear and convincing evidence."

FACTS

[redacted] has been charged with two counts of possessing a firearm under 18 U.S.C. § 922(g)(1) and one count of possessing a stolen firearm under 18 U.S.C. § 922(j) arising from an incident where he took a state trooper's gun during an altercation. These offenses are alleged to

have occurred on or about November 19, 2021. For purposes of mitigation, [redacted] was evaluated by [redacted] who qualifies as an "expert" under 5 U.S.C. § 3109. [redacted] performed a psychological evaluation on [redacted]. Based on this evaluation, [redacted] concluded that [redacted] suffers from untreated and unresolved PTSD caused by a prior incident where [redacted] was shot by a different state trooper.

DISCUSSION

Under federal law, Congress has defined the insanity defense as the following: "an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense." 18 U.S.C. § 17(a). The burden of proving insanity is on the defendant who must prove it by "clear and convincing evidence." *United States v. Owen*s, 854 F.2d 432, 434-35 (11th Cir. 1988).

While it's unclear whether this court would recognize PTSD as a basis for the insanity defense, this memorandum summarizes cases in which federal courts have considered pretrial motions regarding the admission of expert testimony where PTSD was the sole basis for an insanity defense. This implies the availability of the defense based on PTSD in [redacted] case. For example, the federal district court in the District of Columbia has found that PTSD could qualify as the sole basis for an insanity defense. *U.S. v. Rezaq,* 918 F. Supp 463 (D.D.C. 1996). In that case, the defendant was charged with aircraft piracy, and the defense's sole argument was that the defendant was suffering from PTSD at the time of the offense. There, the court denied the government's motion to preclude the defendant from introducing law and expert testimony as evidence supporting the affirmative defense because that court found that the defense's three

expert reports clearly indicated the defendant's diagnosis of PTSD and was sufficient to satisfy the insanity test set out in 18 U.S.C. § 17(a).

Specifically, in that case, the first expert reported that the defendant had a "severe case of PTSD and depression that 'seriously impaired' his ability to judge the wrongfulness of his conduct." *Rezaq* at 467. That expert also reported that "at the time of the hijacking, defendant's 'personality was fragmenting and the parts—perception, reason, judgment, contemplation of right and wrong, and assessment of consequences—were no longer fully [operative].'" *Id.* The second expert also concluded that the defendant "was unable to appreciate [the] wrongfulness of his conduct" and described their "mental state at the time of the hijacking as 'fragile, vulnerable, and unstable.'" *Id*. at 468. While the third expert also concluded that the defendant "was unable to appreciate the wrongfulness of his acts," the third expert did not describe the defendant's PTSD as severely as the other experts. *Id.* The court held that while the third expert did not describe the PTSD as being "severe," it did not preclude the possibility that the defendant could meet the insanity standard under 18 U.S.C. § 17(a) since the court considered the three records as a whole. *See id.*

In another case, the First Circuit held that the lower court's decision to exclude expert testimony was not improper when the only evidence supporting a defendant's insanity defense was a psychiatrist's report describing the defendant's PTSD as "significant" rather than "severe." *See United States v. Cartagena-Carrasquillo,* 70 F.3d 706, 712 (1st Cir. 1995). Additionally, the First Circuit concluded that while the psychiatrist's report accepted the defendant's statements that he was suffering from delusions, it failed to link the delusions with PTSD or with the incapacity to determine whether selling cocaine was wrong. *See id.* Similarly, the Eighth Circuit also addressed PTSD as the sole basis for an insanity defense. *See United States v. Long Crow*, 37 F.3d 1319 (8th

Cir. 1994). In *Long Crow*, the court determined that there was insufficient evidence to support giving insanity instructions when the only evidence was the defendant's own testimony and the testimony of an expert psychiatrist that did not evaluate the defendant "for the purpose of diagnosis." *Id.* at 1324. In its opinion, the *Long Crow* Court also explained that while it was unable to find any cases "that treated PTSD as a severe mental defect amounting to insanity," it did "not reject the possibility that PTSD could be a severe mental disorder in certain instances." *Id.*at 1324. And finally, though the defense was not based on PTSD, the Eleventh Circuit has held in a possession-of-a-firearm case that the defendant was entitled to have insanity instructions given to the jury when the expert testimony was that the defendant was "psychotic" and "would lose touch with reality." *United States v. Owens*, 854 F.2d 432, 436 (11th Cir. 1988).

Here, if [redacted] were to assert an insanity defense based on his untreated and unresolved PTSD, the burden would rest on [redacted] to prove by clear and convincing evidence that (1) his PTSD qualifies as a severe mental disease or defect, and (2) at the time of the offense, his PTSD caused insanity, which made him unable to appreciate the wrongfulness of grabbing the state trooper's gun. *See* 18 U.S.C. § 17; *see also Owens* at 434-35. This evidence can be established through expert testimony.

Currently, [redacted] report states that it is her opinion that "given the situational context of the attempted assault in 2008 and its similarities to the 2021 circumstances of the offense (e.g., the location, the race and position of the state trooper involved), [redacted] would have been at an increased risk to have interpreted his life as having been in danger during the 2021 offense." [[redacted] Updated Mitigation Report] A court would likely find this testimony, by itself, insufficient to establish an insanity defense. See *Cartagena-Carrasquillo* at 712. For the court to find sufficient evidence in this case, there would likely need to be other expert testimony offered

in addition to [redacted] testimony — or [redacted] would need to be able to provide testimony of the following: (1) [redacted] PTSD is "severe"; (2) [redacted] was suffering from PTSD when the criminal conduct occurred; (3) there is a direct connection between [redacted] PTSD and the grabbing of the state trooper's gun; and (4) because of his PTSD, [redacted] would not have been able to appreciate the wrongfulness of his actions as they were occurring. *See Rezaq* at 467. Even if [redacted] can provide this testimony, it still may be in [redacted] best interest to have at least one other expert witness that can offer a similar opinion to [redacted] because it will make [redacted] defense more compelling being the court will likely review the record and evidence as a whole. *See Rezaq* at 468.

CONCLUSION

While this defense has not been very successful at trial, I do think that [redacted] can meet the requirements for the insanity test under 18 U.S.C. § 17(a) if expert testimony can provide evidence that [redacted] PTSD is severe and that there is a direct connection between PTSD and insanity which caused him to not appreciate the wrongfulness of his actions at the time the offense was going on.

ARGUMENT

This Court should reverse the district court's granting of summary judgment in favor of Alabama Auto for two reasons. First, summary judgment is not appropriate because there is a genuine issue of material fact since a reasonable jury could find that Johnson was not subject to the administrative exemption. Second, a jury could conclude that Alabama Auto's violation was willful, and therefore Johnson's FLSA claim was not barred by the two-year statute of limitations.

I. There was sufficient evidence for a reasonable jury to find that Johnson was not exempt from overtime pay under the FLSA.

This Court should reverse the district court's ruling in favor of Alabama Auto because the district court erred as a matter of law in granting summary judgment because a genuine issue of material fact exists as to whether Johnson was employed in an administrative capacity. Under the FLSA, "no employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation of time and a half." 29 U.S.C. § 207(a)(1). The only time an employer is exempt from the FLSA's overtime compensation requirement is when the worker has been "employed in a bona fide executive, administrative, or professional capacity." *Id.* § 213(a)(1). There are three requirements an employee must meet to qualify for the administrative exemption under the FLSA. *See* 29 C.F.R. § 541.200. First, the employee must be "compensated on a salary or fee basis . . . of not less than $684 per week." *Id.* § 541.200(a)(1). Second, the employee's

primary duty must be "office or non-manual work directly related to the management or general business operations of the employer." *Id.* § 541.200(a)(2). Third, the employee's primary duty must include "the exercise of discretion and independent judgment with respect to matters of significance." *Id.* § 541.200(a)(3).

As explained below, the district court erred in granting summary judgment in favor of Alabama Auto as a matter of law. While both parties agree that Johnson was a salaried employee who made more than $684 per week, there is a genuine dispute of material fact regarding whether Johnson satisfied the primary duty requirement and the discretion and independent judgment requirement to establish administrative exemption under the FLSA. *See id.* § 541.200.

A. A genuine dispute of material fact exists as to whether Johnson's primary duties relate to Alabama Auto's management or business operations.

Summary judgment was not appropriate because a genuine issue of material fact exists as to whether Johnson's primary duties included office or nonmanual work directly related to Alabama Auto's management or business operations. To qualify for an administrative exemption, an employee's primary duty must include work directly related to their employer's "management or general business operations." *Id.* § 541.201(a). To satisfy the primary duty requirement, "an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing

production line or selling a product in a retail or service establishment." *Id.* An employee's exempt status cannot be established by "job title alone." *Id.* § 541.2

Primary duty is "the principal, main, major or most important duty that the employee performs." *Id.* § 541.700(a). Regulations provide a list of factors that should be considered when determining an employee's primary duty. *See id.* These factors include (1) the amount of time the employee spends performing exempt work; (2) the employee's level of supervision; and (3) "the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee." *Id.* While an employee can qualify for administrative exemption without spending more than 50% of the time performing exempt administrative work, the time the employee spends "performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee." *Id.* § 541.700(b). Even if an assistant manager of a retail establishment performs exempt duties, they will generally not be able to satisfy the primary duty requirement if they "are closely supervised and earn little more than the nonexempt employees." *Id.* § 541.700(c).

Here, a genuine dispute of material fact exists as to whether Johnson's primary duty as Assistant Manager required her to perform work directly related to "assisting with the running or servicing" of Alabama Auto. See *id.* § 541.201(a). There are several reasons a jury could conclude that Johnson's primary duty was sales work.

See id. Johnson's work duties were similar to the duties performed by the sales technicians who did not hold an exempt position. (Doc. 25-4 at 2). Both the sales technicians and Johnson helped customers find products and checked customers out at the register. (*Id*.; Doc. 25-1 at 3). Johnson's frequent interaction with customers also raises a genuine question as to whether her primary duties were focused on the company's customers or its day-to-day operations. *See* 29 C.F.R. § 541.201(a).

Furthermore, there was no significant difference between Johnson's salary as Assistant Manager compared to the wages paid to other employees to do nonexempt work. *See id.* § 541.700(c). To illustrate, Johnson's salary was $43,200 a year, or $3,600 per month, whereas Samuel Taylor, a nonexempt sales technician at Alabama Auto, made $37,000 a year, or $3,000 a month. (Doc. 25-2 at 10; Doc. 24-5 at 4).

Johnson also spent more time performing non-exempt duties than exempt duties. *See* 29 C.F.R. § 541.700(b). Specifically, Johnson spent 60% of her time performing nonexempt sales-related work. (Doc. 25-1 at 3). While Johnson did sales work nearly every day, her administrative duties, like creating the work schedules and reviewing the timesheets, were done bi-weekly. (*Id*. at 7). Lastly, a genuine dispute exists regarding the amount of freedom Johnson had from supervision**.** *See* 29 C.F.R. § 541.700(b). All decisions were subject to the Store Manager's final review. (Doc. 25-3, ¶ 9). Based on the evidence and regulatory guidance, a reasonable jury could find that Johnson's primary duties did not directly relate to the

servicing or running of Alabama Auto. *See* 29 C.F.R. § 541.201(a). Because a reasonable jury could find that Johnson's primary duty was sales, a genuine dispute of a material fact exists. For this reason, the district court erred in granting summary judgment as a matter of law. *See* Fed. R. Civ. P. 56(a).

B. There is a genuine dispute as to whether Johnson's primary duties required her to exercise discretion and independent judgment concerning matters that were significant to Alabama Auto.

Summary judgment was not appropriate because a reasonable jury could find that Johnson did not exercise independent judgment and discretion. "To qualify for the administrative exemption, an employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance." 29 C.F.R. § 541.202(a). "[M]atters of significance refers to the level of importance or consequence of the work performed." *Id.* Exercising discretion and independent judgment requires an employee to evaluate the "possible courses of conduct" and then act or reach a decision after considering "the various possibilities." *Id.* To determine "whether an employee exercises discretion and independent judgment with respect to matters of significance," the following factors are considered: (1) whether the employee could "formulate, affect, interpret, or implement management policies or operation practices;" (2) whether the work the employee performed affected the "business operations to a substantial degree;" (3) whether the employee could "waive or deviate from established policies and procedures without prior

approval;" and (4) whether the employee could commit their employer in matters that could have a "significant financial impact." *Id.* § 541.202(b). To satisfy this requirement, an employee must be able to "make an independent choice, free from immediate discretion or supervision." *Id.* § 541.202(c). Discretion does not include clerical work, secretarial work, or "recurrent or routine" work. *Id.* § 541.202(e).

Here, there is sufficient evidence for a reasonable jury to conclude that Johnson's position did not satisfy the administrative exemption's discretion and independent judgment requirement. *See id.* § 541.202(a). The record evidence suggests that Johnson could not make independent choices free from the Store Manager's "immediate direction or supervision." *Id.* § 541.202(c). For example, Johnson could not adjust the work schedule without the Store Manager's approval. (Doc. 25-4 at 3). Similarly, while Johnson could recommend products and prepare purchase orders for the store, all purchase orders required the Store Manager's final approval and signature. (Doc 25-1 at 6). This is important because it shows that Johnson lacked the authority to commit Alabama Auto in matters that had a significant financial impact. *See* 29 C.F.R. § 541.202(b). Company policy also required Johnson to report all customer problems and complaints to her Store Manager and any actions she planned to take to resolve them. (Doc. 25-3, ¶ 6). Johnson, therefore, could not "waive or deviate from established policies and procedures." 29 C.F.R. § 541.202(b). Lastly, a jury could conclude that certain

duties that Johnson performed, like preparing purchase orders, setting work schedules, reviewing work orders, and reviewing employee timesheets, were clerical/secretarial duties that did not include the exercise of discretion. *See id.* § 541.202(e). Because there is a genuine dispute about whether Johnson's primary duties required her to exercise discretion and independent judgment, summary judgment should not have been granted. *See* Fed. R. Civ. P. 56(a).

Because a reasonable jury could conclude that Johnson's position did not qualify for the administrative exemption under the FLSA, Alabama Auto was not entitled to judgment as a matter of law. *See id.*

II. There was sufficient evidence for a reasonable jury to find that the two-year statute of limitations did not bar Johnson's claim because Alabama Auto's violation of the FLSA was willful.

The district court erred in granting Alabama Auto's motion for summary judgment because a reasonable jury could find that Alabama Auto willfully violated the FLSA's overtime pay requirement. While the general rule is that a cause of action under the FLSA "must be commenced within two years . . . a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued." 29 U.S.C. § 255(a). An employer willfully violates the FLSA if it "knew or showed a reckless disregard for the matter of whether its conduct was prohibited by the statute*." McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988). Reckless disregard is "the failure to make adequate inquiry into whether

conduct is in compliance with the Act." *Alvarez Perez v. Sanford Orlando Kennel Club, Inc.*, 515 F.3d 1150, 1163 (11th Cir. 2008). "[W]hen an employer's actions squelch truthful reports of overtime worked or where the employer encourages artificially low reporting, it cannot disclaim knowledge." *Allen*, 495 F.3d. at 1319.

Here, there is sufficient evidence for a jury to conclude that the two-year statute of limitations did not bar Johnson's claim because Alabama Auto willfully violated the FLSA. In 2016, Alabama Auto asked its outside counsel to review five employee positions and classifications, one being Assistant Manager. (Doc. 25-2 at 5). The lawyer had more questions about the Assistant Manager position than any other position. (*Id.* at 6). Ultimately Alabama Auto was advised to minimize the sales work being performed by its assistant managers. (*Id.*). However, its only response was to have Claire Radford, its Human Resources Manager, pass the advice to the store managers. (*Id.* at 8). While Alabama Auto has agreed to produce documents relevant to the 2016 communication with outside counsel, it has yet to do so. (*Id.* at 6). Alabama Auto's failure to provide this evidence raises a genuine issue of whether the store managers took the proper steps to minimize the sales work of their assistant managers. (*Id.*). While Johnson's Store Manager recalls being told this advice, he admits that no changes were made to the amount of sales work Johnson was doing because she did great "in her sales position." (Doc. 25-3, ¶ 7).

Lastly, there is evidence that Alabama Auto has generally discouraged

overtime and does its best to avoid it. *See Allen*, 495 F.3d. at 1319. Alabama Auto views overtime as unnecessary. (Doc. 25-2 at 9). The company's negative treatment of overtime has made it clear to employees that it is not acceptable to work over 40 hours and then attempt to claim overtime pay. (Doc. 25-1 at 8). The company's conduct resulted in employees at two different stores under-reporting their hours out of fear that their managers would take action against them. (Doc. 25-2 at 3).

Viewing the evidence in the light most favorable to Johnson, a jury could conclude from these facts that Alabama Auto willfully violated the FLSA by not inquiring into whether its actions complied with the FLSA. *See McLaughlin*, 486 U.S. at 133; *Alvarez*, 515 F.3d at 1163. Because a jury could find in Johnson's favor, the district court erred in granting summary judgment in favor of Alabama Auto.

Because both issues present a genuine dispute of material fact, Alabama Auto was not entitled to judgment as a matter of law. *See* Fed. R. Civ. P 56(a).

Applicant Details

First Name	**Gregory**
Last Name	**Margida**
Citizenship Status	**U. S. Citizen**
Email Address	**margidag@berkeley.edu**
Address	**Address** Street **5627 N. Gay Ave., Unit B** City **Portland** State/Territory **Oregon** Zip **97217** Country **United States**
Contact Phone Number	**3306142594**

Applicant Education

BA/BS From	**Grinnell College**
Date of BA/BS	**May 2016**
JD/LLB From	**University of California, Berkeley School of Law** **https://www.law.berkeley.edu/careers/**
Date of JD/LLB	**May 8, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Berkeley Journal of Criminal Law**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Kerr, Orin
orin@berkeley.edu
Roth, Andrea
aroth@law.berkeley.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

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Portland, Oregon 97217
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The Honorable Juan R. Sánchez
United States District Court for the Eastern District of Pennsylvania
14613 United States Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106

Dear Judge Sánchez:

I am writing to apply for a judicial clerkship in your chambers for the 2024-25 term. Currently, I am a rising third-year student at the University of California, Berkeley, School of Law where I serve as a research assistant for Professors Andrea Roth and Ted Mermin and lead a spring break pro bono trip. As an aspiring public defender dedicated public service, working in your chambers would be ideal because of your public defense and legal aid experience.

A quality I hope to bring to your chambers is a relentless dedication to expanding my research and writing skills. I have prioritized opportunities for research and writing mentorship during law school, primarily by serving as a research assistant to four professors. While working for Professor Gerald Leonard at Boston University, I discovered my love for complex rule explanation while writing a memo explaining California's new felony murder statute.

I explored this passion further while working with Professor Mermin studying compelled commercial speech. I asked to work with Professor Mermin because I knew he had a reputation for working closely with students while holding them to high standards. Professor Mermin met with me weekly to provide feedback on my research process and writing structure. My time as his research assistant helped me learn to understand and explain a complex and nuanced rule, which is a skill I hope to bring into your chambers. Even more, I want to bring my commitment to strengthening my writing with each deliverable I produce for you throughout the term.

Enclosed, please find my resume, law school transcripts from Boston University and Berkeley, and writing sample. Letters of recommendation from Professors Andrea Roth and Orin Kerr are also attached.

Please do not hesitate to contact me at the above address or telephone number if you need any additional information. Thank you for your time and consideration.

Sincerely,

Gregory Margida

GREGORY MARGIDA

5627 N. Gay Ave. Unit B, Portland, OR
(330) 614-2594 | margidag@berkeley.edu

EDUCATION

University of California, Berkeley, School of Law, Berkeley, CA
J.D. Candidate, May 2024
Honors: Second-Year Academic Distinction (Top 15%), American Jurisprudence Award for Top Grade in Evidence, American Jurisprudence Award for Top Grade in Criminal Ethics
Activities: Criminal Law Journal, Central Valley Spring Break Pro Bono Trip, Transfers at Berkeley Law (Academic and Professional Chair), Kentucky Spring Break Pro Bono Trip Leader

Boston University School of Law, Boston, MA
J.D. Candidate, Aug. 2021 – Aug. 2022
Honors: *Law Review* Write-On Selection, G. Joseph Tauro Distinguished Scholar, Top 10%
Activities: Research Assistant for Professor Robert Tsai, Research Assistant for Professor Gerald Leonard, Spring Break Pro Bono Program, BU Defenders (Co-Founder), Admitted Students Day Panelist

Grinnell College, Grinnell, IA
B.A. in Biology (with Honors) and French, May 2016
Honors: Dean's List, Track and Field Coaches' Award, Cross Country Captain, Students on Climate Change Selection
Activities: Track and Field, Cross Country, Teaching Assistant, Student Government, Student Educational Policy Committee, Student-Athlete Advisory Committee

PROFESSIONAL EXPERIENCE

Metropolitan Public Defenders, Portland, OR — June 2023 – Present
Certified Law Student (Legal Intern)
Represent indigent clients accused of misdemeanors in state court. Certified to appear on the record and perform all defense functions, including writing and arguing pretrial motions and arguing at trial.

Center for Death Penalty Litigation, Durham, NC — June 2022 – Aug. 2022
Legal Intern
Researched federal case law on juror misconduct. Investigated prospective jurors prior to capital trial. Helped client practice testimony before homicide trial. Reviewed and edited post-conviction motions.

San Francisco Public Utilities Commission, San Francisco, CA — April 2019 – Aug. 2021
Administrative Analyst
Drafted real estate agreements and correspondence for third-party use of city property. Provided logistics support for Department Operations Center during response to COVID-19.

San Francisco Recreation and Parks, San Francisco, CA — Aug. 2016 – April 2019
Junior Administrative Analyst (Aug. 2017 – April 2019)
San Francisco Fellow (Aug. 2016 – Aug. 2017)
Selected for San Francisco Fellowship, which prepares young professionals for leadership positions in public service. Served as department liaison to other city departments for emergency management issues. Tracked developing local emergencies and provided prompt information to department leadership.

SELECTED VOLUNTEER EXPERIENCE

- Co-founder, The Valentine Project (2011 – Present). Send gift packages to children with chronic illnesses.
- Prison Mail Night Volunteer, Ella Baker Center for Human Rights (2021 – Present).
- Board member, Alice B. Toklas LGBTQ Democratic Club (2019 – 2021).
- Volunteer, Stories from Mom and Dad (2018 – 2021). Visited incarcerated parents in San Francisco jails and helped create audio records of parents reading books to send to their children.
- Volunteer, Most Holy Redeemer, Community Meals and Hospitality Team (2016 – 2021).

BOSTON UNIVERSITY SCHOOL OF LAW

Name: MARGIDA, GREGORY A
Date Entered: 09/07/2021
Colleges and Degrees:
GRINNELL COLLEGE, B.A. 5/23/2016

Other Law School Attendance:

Degree Awarded:
Date Graduated:
Honors:

Academic Record		Credits	Grades
Semester 1 - 2021 -2022			
CIVIL PROCEDURE (D)	COLLINS	4	A
CONTRACTS (D)	O'BRIEN	4	A
LAWYERING SKILLS 1	LIZOTTE	2.5	A
TORTS (D2)	ZEILER	4	A
Semester 2 - 2021 -2022			
CONSTITUTIONAL LAW (D)	WEXLER	4	B+
CRIMINAL LAW (D)	LEONARD	4	A
LAWYERING LAB	VOLK ET AL	1	P
LAWYERING SKILLS II	LIZOTTE	2.5	A
MOOT COURT	LIZOTTE	-	P
PROPERTY (D)	LAWSON	4	A
Semester 3 - 2021 -2022			
BUSINESS FUNDAMENTALS	WALKER/TUNG	-	*

Year	Hours	Weighted Points	Weighted Average
1st	29/30	113.20	3.90

1974 Family Educational Rights and Privacy Act Information

The information contained on this transcript is not subject to disclosure to any other party without the expressed written consent of the student or his/her legal representative. It is understood this information will be used only by the officers, employees and agents of your institution in the normal performance of their duties. When the need for this information is fulfilled, it should be destroyed.

Status: (Good Standing is certified unless otherwise noted)

This record is a certified transcript only if it bears an official signature below.

Aida E. Ten

Aida E. Ten, Registrar

Date Printed: 6/14/2022

Boston University School of Law Transcript Guide

SYMBOLS OR ABBREVIATIONS

AUD	Audit	**H**	Honors
CR	Credit	**NC**	No credit
P	Pass	**F**	Fail
W/D	Withdrawal from course		
*	Indicates currently enrolled		
(C)	Clinical		
(S)	Seminar		
(Y)	Year-long course		

Academic Qualifications – JD Program: The School of Law has a letter grading system in courses and seminars. The minimum passing grade in each course and seminar is a **D**. Beginning with the Class of 2017, a minimum of eighty-five passing credit hours must be completed for graduation. Prior classes required a minimum of eighty-four passing credit hours. The minimum average for good standing is C (2.0) and the minimum average for graduation is C+ (2.3). Prior to 2006 the minimum average for good standing and graduation was C (2.0).

GRADING SYSTEM

1. **Current Grading System** The following letter grade system is effective fall 1995. The faculty has set the following as an appropriate scale of numerical equivalents for the letter grading system used in the School of Law:

A+	4.3	C+	2.3
A	4.0	C	2.0
A-	3.7	C-	1.7
B+	3.3	D	1.0
B	3.0	F	0
B-	2.7		

For all courses and seminars with enrollments of 26 or more, grade distribution is mandatory as follows:

A+	0-5%
A+, A, A-	20-30%
B+ and above	40-60%
B	10-50%
B- And below	10-30%
C+ and below	0-10%
D, F	0-5%

2. **Fall 1995-Spring 2008**

For **first-year courses** with enrollment of twenty-six or more, grade distribution is mandatory as follows:

A+	0-5%
A+, A, A-	20-25%
B+ and above	40-60%
B	10-50%
B- and below	10-30%
C+ and below	5-10%
D, F	0-5%

3. **1991 Changes to Letter Grade System.**

The curve is mandatory for all seminars or courses with enrollments of twenty-six or more.

Grade	Number Equivalent	Curve
A+	4.5	
A	4.0	15-20%
B+	3.5	
B	3.0	50-60%
C+	2.5	
C	2.0	20-35%
D	1.0	
F	0	

The median for all courses with enrollments of twenty-six or more is B. For smaller courses, a median of B+ is recommended but not required.

GRADES FOR COURSES TAKEN OUTSIDE THE SCHOOL OF LAW

Grades for courses taken outside of BU Law are recorded as transmitted by the issuing institution or as CR. Credit toward the degree is granted for these courses and no attempt is made to convert those grades to the BU Law grading system. The grade is not factored into the law school average.

CLASS RANKS

BU Law does not rank students in the JD program with the following exceptions:

Mid-Year Ranks

Effective May 2014, the Registrar is authorized to release the g.p.a. cut-off points to the top 5%, 10%, 15%, 20%, 25% and one-third for the fifth semester in addition to third semester reporting adopted May 2013 and yearly reporting of the same.

Effective January 2013

For students who have completed their third semester, with respect to the cumulative average earned during the fall semester, the Registrar will inform the top fifteen students of their rank and will provide g.p.a. cut-off points for the top 10 percent, 25 percent and one-third of the class. This is in addition to the yearly reporting described below.

Effective May 2011

For students who have completed their first year, the Registrar will inform the top five students in each section of their section rank and will provide grade point average cut-offs for the top 10 percent, 25 percent and one-third of each section.

For students who have completed their second year or third year, with respect to both the average earned during the most recent year and cumulative average, the Registrar will inform the top fifteen students of their rank and will provide g.p.a. cut-off points for the top 10 percent, 25 percent and one-third of the class.

Class of 2008 and subsequent classes through April 2011.

For students who have completed their first year, the Registrar will inform the top five students in each section of their section rank and will provide g.p.a. cut-off points for the top 10 percent of each section.

For students who have completed the second year or third year, with reference to both the second-year or third-year g.p.a. and cumulative g.p.a., the Registrar will inform the top fifteen students in the class of their ranks and will provide g.p.a. cut-off points for the top 10 percent of the class.

Scholarly Categories (Based on yearly averages only)

Class of 2008 and subsequent classes:

First Year – the top five students in each first-year section will be designated G. Joseph Tauro Distinguished Scholars. The remaining students in the top ten percent of each first-year section will be designated G. Joseph Tauro Scholars.

Second Year – the top fifteen students in the second year class will be designated Paul J. Liacos Distinguished Scholars. The remaining students in the top ten percent of the second-year class will be designated Paul J. Liacos Scholars.

Third Year – the top fifteen students in the third year class will be designated Edward F. Hennessey Distinguished Scholars. The remaining students in the top ten percent of the third-year class will be designated Edward F. Hennessey Scholars.

Graduate Program Transcript Guides

LL.M. in Taxation

Current Grading System:

A+	4.3	C+	2.3
A	4.0	C	2.0
A-	3.7	C-	1.7
B+	3.3	D	1.0
B	3.0	F	0
B-	2.7		

The grade averages of continuing part-time students whose enrollment began before the fall 1995 semester were converted to the new number equivalents.

Fall 1991 to Spring 1995

From the fall 1991 semester through the spring 1995 semester, the following letter grading system was in effect for students who were graduated before the fall 1995 semester:

A+	4.5	C+	2.5
A	4.0	C	2.0
B+	3.5	D	1.0
B	3.0	F	0.0

Current Degree Requirements

Effective May 2016, completion of 24 credits. Minimum average of 2.3 and no more than one grade of D.

Spring 1993 to Fall 2015

Completion of 24 credits. Minimum average of 3.0 and no more than one grade of D.

Fall 1991 to Fall 1993

Completion of ten courses (20 credits). Minimum average of 3.0 (with no more than one grade below 1.0).

LL.M. in Banking and Financial Law

Current Grading System

A+	4.3	C+	2.3
A	4.0	C	2.0
A-	3.7	C-	1.7
B+	3.3	D	1.0
B	3.0	F	0
B-	2.7		

Current Degree Requirements

Effective April 2016, completion of 24 credits with a minimum average of 2.7 and no more than one grade of D or F.

Fall 2012 to Spring 2016

Completion of 24 credits with a minimum average of 3.0 and no more than one grade of D or F.

Fall 1991 to Fall 2012

Completion of ten courses (20 credits). Minimum average 3.0 (with no more than one grade below 1.0).

LL.M. in American Law

Current Grading System:

A+	4.3	C+	2.3
A	4.0	C	2.0
A-	3.7	C-	1.7
B+	3.3	D	1.0
B	3.0	F	0
B-	2.7		

Current Degree Requirements

Completion of twenty-four course credits with at least ten credits per semester. The minimum average for good standing and graduation is 2.3. Minimum course average is 2.0.

LL.M. in Intellectual Property Law

Current Grading System:

A+	4.3	C+	2.3
A	4.0	C	2.0
A-	3.7	C-	1.7
B+	3.3	D	1.0
B	3.0	F	0
C-	2.7		

Current Degree Requirements

Completion of twenty-four course credits with at least ten credits per semester. The minimum average for good standing and graduation is 2.3. Minimum course average is 2.0.

Executive LL.M. in International Business Law

Current Grading System:

A+	4.3	C+	2.3
A	4.0	C	2.0
A-	3.7	C-	1.7
B+	3.3	D	1.0
B	3.0	F	0
B-	2.7		

Current Degree Requirements

Effective Spring 2014, completion of twenty credits with a minimum g.p.a. of 3.0 including the successful completion (CR) of two colloquia.

Grading System prior to Spring 2014

Honors (H)	Credit (CR)
Very Good (VG)	No Credit (NC)
Pass (P)	Fail (F)

Requirements Prior to Spring 2014

Completion of six courses (18 credits) and two colloquia (2 credits) for a total of 20 credits. The minimum passing grade for each course is Pass (P). The minimum passing grade for each colloquium is Credit (CR).

5/2016 rev2

Boston University's policies provide for equal opportunity and affirmative action in employment and admission to all programs of the University.

BU School of Law

Transcript Guide Addendum

JURIS DOCTOR PROGRAM
LL.M. IN AMERICAN LAW PROGRAM
LL.M. IN INTELLECTUAL PROPERTY LAW PROGRAM

Grading System – Distribution Requirements

Effective Fall 2019

For all courses and seminars with enrollments of 26 or more, grade distribution is mandatory as follows:

A+	2-5 %
A+, A	15-25%
A+, A, A-	30-40%
B+ and above	50-70%
B	15-50%
B- and below	0-15%
C+ and below	0-10%
D, F	0-5%

Fall 2020

The distribution requirement for Fall 2020 upper-class courses with 26 or more students was suspended. Upper-level courses with 26 or more students were required to conform to a B+ median.

Effective Spring 2021

For all upper-level courses with an enrollment of 26 or more a B+ median is required with the following additional constraints:

A+	Maximum 5%
A+, A, A-	Minimum 30%
B and below	Minimum 10%
B- and below	Maximum 15%
C+ and below	0-10%
D, F	0-5%

Berkeley Law
University of California
Office of the Registrar

Gregory A Margida
Student ID: 3038683325
Admit Term: 2022 Fall

Printed: 2023-06-11 12:34
Page 1 of 1

Academic Program History
Major: Law (JD)

Awards

Jurisprudence Award 2022 Fall: Evidence
Jurisprudence Award 2023 Spr: Criminal Law Ethics Seminar

2022 Fall

Course		Description	Units	Law Units	Grade
LAW	231	Crim Procedure-Investigations Erwin Chemerinsky	4.0	4.0	P
LAW	241	Evidence Andrea Roth	4.0	4.0	HH
LAW	246.1	Criminal Trial Practice **Units Count Toward Experiential Requirement** Charles Denton	3.0	3.0	H
LAW	278.78	Computer Crime Law Orin Kerr	3.0	3.0	HH

Transfer Credits	Units	Law Units
Boston Univ School of Law	27.0	27.0
Fulfills Constitutional Law Requirement		
Boston Univ School of Law.	3.0	3.0
Units Count Toward Experiential Requirement		

	Units	Law Units
Term Totals	44.0	44.0
Cumulative Totals	44.0	44.0

2023 Spring

Course		Description	Units	Law Units	Grade
LAW	231.1	Crim Procedure- Adjudication Hadar Aviram	4.0	4.0	H
LAW	236	Capital Punish & Constitution **Fulfills 1 of 2 Writing Requirements** Ryan Davis	3.0	3.0	H
LAW	288.1	Immigration Law David Hausman	4.0	4.0	HH
LAW	295C	Criminal Law Ethics Seminar **Fulfills Either Prof. Resp. or Experiential** Nisha Shah Joseph Breyer Susan Schechter	2.0	2.0	HH
LAW	299	Indiv Res Project **Fulfills 1 of 2 Writing Requirements** Andrea Roth	1.0	1.0	HH
LAW	299	Indiv Res Project Seth Mermin	1.0	1.0	H

	Units	Law Units
Term Totals	15.0	15.0
Cumulative Totals	59.0	59.0

2023 Fall

Course		Description	Units	Law Units	Grade
LAW	212.3	Critical Race Theory Khiara Bridges	2.0	2.0	
LAW	222	Federal Courts William Fletcher	3.0	3.0	
LAW	230.2	Police Interr&Invest:Comp Pers **Fulfills 1 of 2 Writing Requirements** Charles Weisselberg	2.0	2.0	
LAW	255.61	Evolving Topics in Sports Law	1.0	1.0	
LAW	267.4	Law, Hist Found Sem Christopher Tomlins	3.0	3.0	

	Units	Law Units
Term Totals	0.0	0.0
Cumulative Totals	59.0	59.0

Carol Rachwald, Registrar

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Berkeley Law
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KEY TO GRADES

1. Grades for Academic Years 1970 to present:

HH	–	High Honors	CR	–	Credit
H	–	Honors	NP	–	Not Pass
P	–	Pass	I	–	Incomplete
PC	–	Pass Conditional or Substandard Pass (1997-98 to present)	IP	–	In Progress
NC	–	No Credit	NR	–	No Record

2. Grading Curves for J.D. and Jurisprudence and Social Policy PH.D. students:

In each first-year section, the top 40% of students are awarded honors grades as follows: 10% of the class members are awarded High Honors (HH) grades and 30% are awarded Honors (H) grades. The remaining class members are given the grades Pass (P), Pass Conditional or Substandard Pass (PC) or No Credit (NC) in any proportion. In first-year small sections, grades are given on the same basis with the exception that one more or one less honors grade may be given.

In each second- and third-year course, either (1) the top 40% to 45% of the students are awarded Honors (H) grades, of which a number equal to 10% to 15% of the class are awarded High Honors (HH) grades or (2) the top 40% of the class members, plus or minus two students, are awarded Honors (H) grades, of which a number equal to 10% of the class, plus or minus two students, are awarded High Honors (HH) grades. The remaining class members are given the grades of P, PC or NC, in any proportion. In seminars of 24 or fewer students where there is one 30 page (or more) required paper, an instructor may, if student performance warrants, award 4-7 more HH or H grades, depending on the size of the seminar, than would be permitted under the above rules.

3. Grading Curves for LL.M. and J.S.D. students for 2011-12 to present:

For classes and seminars with 11 or more LL.M. and J.S.D. students, a mandatory curve applies to the LL.M. and J.S.D. students, where the grades awarded are 20% HH and 30% H with the remaining students receiving P, PC, or NC grades. In classes and seminars with 10 or fewer LL.M. and J.S.D. students, the above curve is recommended.

Berkeley Law does not compute grade point averages (GPAs) for our transcripts.

For employers, more information on our grading system is provided at: https://www.law.berkeley.edu/careers/for-employers/grading-policy/

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May 24, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

My student Greg Margida has applied for a clerkship in your chambers, and he has asked me to write a letter in support of his application. I am happy to do so. I'm a fan of Greg, and I hope you will invite him in for an interview.

I know Greg because he was a student in my Fall 2022 class for upper-level students, Computer Crime Law. When Greg first enrolled in my class, I was a little bit skeptical. He contacted me by e-mail before the class began, and he explained to me that he was a transfer student from Boston University and that he liked to ask a lot of questions outside class. Given that he could not make my scheduled office hours, he wrote, he was worried that I would not be able to meet with him enough outside class to make sure his questions were answered. My initial thought was that he sounded like a demanding millennial who was going to be difficult. But I was wrong — very wrong. Greg completely won me over during the semester, so much that he became one of my favorite students.

Let me explain why. First, Greg is completely honest and free of all the calculations that afflict so many top law students. He is a genuine and very earnest person. He knows that he can be a little bit enthusiastic, and he laughs at his own enthusiasm. But he is really insightful and thoughtful. That was true in my class, where he grappled openly with some of the complicated problems we confronted. Most Berkeley students want to pretend everything is easy. For the most part, whatever sounds like the most progressive answer is the one students rush to adopt in class. Greg is certainly progressive, but he also recognized that I was presenting the class with genuinely hard problems. Greg didn't shy away from the difficulty. He had the confidence to see both sides and grapple with them in front of his classmates. I appreciated his perspective so much that, when I had a class about student dynamics in the classroom, I sought out Greg and asked him in private what his view was of what was happening. I saw Greg as a thoughtful person who could (and did) give me good advice. It's exactly the kind of perspective a judge will want from a clerk.

Second, Greg is very smart. It's always uncertain how transfer students will perform when they get to Berkeley. When a student goes from a lower-ranked school to a higher-ranked school, you wonder if they will really measure up to the academic standards at the higher-ranked school. But Greg wrote a beautiful exam in my computer crime law class. In a class of 60 students, he wrote the third-best exam, easily earning a "High Honors" grade which is the highest grade Berkeley Law awards. Greg's exam was a fantastic performance that showed outstanding fluency with the doctrine, thoughtful policy perspectives, and strong writing.

I was not surprised to see Greg also earned a High Honors grade (which means, roughly, within the Top 10%) in Professor Andrea Roth's Evidence class that same Fall 2022. And while Greg earned only a Pass grade in Dean Erwin Chemerinsky's Criminal Procedure course, it might be worth pointing out that Dean Chemerinsky had 196 students in that class, and therefore 196 students to grade. I have no idea how he can grade so many exams so quickly, but I wonder (with all due respect for Erwin!) if Greg's exam might have been better than his grade suggests.

In short, I think highly of Greg. I hope you will invite him in for an interview.

Sincerely,

Orin S. Kerr
William G. Simon Professor of Law
University of California, Berkeley Law School
Berkeley, CA
(cell) 202-365-3303

May 19, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write to recommend Gregory (Greg) Margida for a clerkship in your chambers. Greg was the #1 student in my 100+ person Fall 2022 Evidence class, and I've gotten to know him quite well outside of class because of his interest in public defense and an independent writing project I supervised of his. I give Greg my absolute highest recommendation for a federal clerkship at any level.

Greg was the very top student in my 108-person Fall 2022 Evidence class, earning him the coveted "Am Jur" award. Once I realized after anonymous grading that Greg had "Am Jur'd" the class, I was so excited, because Greg was already the standout student in the class and, though it sounds like a cliché (I'm even laughing while writing this, but it is so true), he is the nicest guy you'll ever meet. He is a very understated and gentle person, and yet he is simply the best. He always had the right answers; always had insightful questions; and came to office hours nearly every day. Saying that, it sounds like I'm describing him as a "gunner," but he doesn't come across that way at all. He's more like a very earnest person who wants to make sure he gets everything right, but in an easygoing, non-stressed way. I haven't really met anyone like him as a student at Berkeley or Stanford, in terms of this combination of driven ambition to get everything right, but having a laid back, easygoing, quick to laugh manner (at least that's how he appears on the surface – I'm sure there are many late nights he puts in to look this non-stressed).

Part of what made Greg stand out was the fact that he was a transfer, which I think is relevant to his ambition and his intellectual curiosity. I find that transfer students in general are a driven bunch who are particularly hard working, don't act entitled, and don't take anything for granted. That's how Greg is. I taught Criminal Law to 1Ls during the same semester as Greg's evidence class, and my 1Ls came to know Greg well, because he would want to sit in on their criminal law questions as well (perhaps because he didn't take Criminal Law at Berkeley, and so he wanted to see if his own knowledge was the same as how I taught the class). He quietly listened, and asked follow up questions piggybacking off other students' interests, rather than trying to show off. Greg became a mascot of sorts (which he took in good fun), with my 1Ls at the end of the semester saying how much they loved Greg and thought of him as part of the class! He really is so likeable, positive and funny in a deadpan, self-deprecating way – more so than any student in recent memory.

Given his Am Jur in Evidence, it doesn't surprise me that Greg also earned a coveted High Honors (top 10%) in Professor Orin Kerr's Computer Crimes class, which he says he loved. Nor does it surprise me that his current Crimmigration professor, David Hausman (who is not one of Greg's recommenders), just told me that Greg was also a standout in his class this semester. Professor Hausman said he particularly appreciated that Greg asked him once in office hours whether he spoke too much in class. The answer was "no," but Professor Hausman noted to me that he really appreciated the question, and that it was brought up in a very appropriate, professional, kind, not falsely modest way that made him like Greg even more.

Greg also did excellent work on an independent research project in which I was his supervisor. He took an interest in a paper I wrote making a straightforward text-based argument for a right to jury trial in "all criminal prosecutions" (as the Sixth Amendment says!), including misdemeanor crimes carrying six months or fewer in jail. As a result I asked if he would be willing to write a template motion based on my article, for defense attorneys to file. His motion was excellent, and he and I have a conference call on Monday with a boutique civil rights firm in New York hoping to use it as the basis for nationwide impact litigation. I told the firm I was happy to meet so long as Greg was included. I trust him completely, both in terms of discretion and professionalism, but also in terms of getting the nuance and complexity of substantive law issues.

Greg's academic success is all the more impressive given his deep commitment to public service. Since coming to Berkeley, he has sought out mentorship and tips for applying for public defender positions. He spent his spring break in the Central Valley doing public interest work. He co-founded the public defender student group at BU in his 1L year, and he is very active in organizing events for the Defenders at Berkeley as a 2L. In his "spare" time, he helps answer legal mail from incarcerated people for the Ella Baker Center here in Oakland. He quietly "does the work" while not crowing about it.

As I already mentioned, Greg is the nicest guy you could ever meet, and I say that knowing how cliché it might sound. He's so unassuming, positive, sweet, gentle, and yet quietly driven, impeccably prepared, and competent. My colleague in the office next door hired Greg as his dog-sitter because he trusted Greg to have access to his house over a long vacation. I can't think of anyone I would want to stay in touch with more, or work with in close quarters in a chambers for a year or two, than Greg.

Greg has also been very deliberate in his judge list, and in targeting district courts first, hoping to clerk for two years and finish with an appellate clerkship. He would be superb in either role.

In sum, Greg would be an excellent federal clerk at any level. I would make 1,000 calls for him. Please do not hesitate to contact me by cell phone, 202-669-6565, or e-mail, aroth@law.berkeley.edu, with any questions.

Very truly yours,

Andrea Roth - aroth@law.berkeley.edu

Andrea Roth
Professor of Law
UC Berkeley School of Law

Andrea Roth - aroth@law.berkeley.edu

Writing Sample

Gregory Margida
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The attached writing sample is an excerpt of a memo I prepared as a research assistant for Professor Ted Mermin. Professor Mermin asked me to review all of the cases citing *NIFLA v. Becerra* in analyzing whether the lower standard of scrutiny from *Zauderer* applied to a compelled commercial disclosure. The memo is substantially my own writing and research. Professor Mermin offered feedback throughout the research process and gave one round of edits on the memo itself. The memo is otherwise all my own work.

Please note that the figures from the original memo have been omitted here for brevity.

MEMORANDUM

TO: Professor Mermin

FROM: Greg Margida

RE: The State of "Uncontroversial" Since *NIFLA*

DATE: April 28, 2023

QUESTION PRESENTED

In the cases since *NIFLA v. Becerra*, what is the meaning of "uncontroversial" for purposes of determining whether *Zauderer* applies in compelled commercial speech analysis?

BRIEF ANSWER

The best predictor of whether a court will find a disclosure uncontroversial is if it dissuades all uses of the speaker's product or service (the "Dissuasion Framework"), and courts typically adopt one or more of three prevalent lines of reasoning to reach their conclusion. A disclosure is likely to be held controversial when it dissuades people from all uses of a product or service. Disclosures that only dissuade from some uses (or that do not dissuade at all) are more likely to be held uncontroversial. Courts have used one or more of three prevalent lines of reasoning to arrive at a holding consistent with the Dissuasion Framework. Meanwhile, nearly all courts have chosen not to adopt the line of reasoning suggested by Justice Thomas in *NIFLA* that a disclosure is controversial if it concerns a politically controversial topic.

DISCUSSION

In compelled commercial speech analysis, a more deferential standard is afforded to the government where the disclosure is "factual and uncontroversial." *Zauderer v. Off. of Disciplinary Couns. of Sup. Ct.*, 471 U.S. 626, 651 (1985). In holding that the *Zauderer* standard did not apply to a California statute compelling licensed crisis pregnancy centers to post information about where patrons could receive abortion care, Justice Thomas noted that abortion is "anything but an 'uncontroversial' topic." *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2372 (2018) [hereinafter, "*NIFLA*"]. *NIFLA* therefore suggests that controversy surrounding the topic of a disclosure—as opposed to the controversial nature of the disclosure itself—is what precludes application of *Zauderer*, opening the door for courts to issue politically-charged restrictions on compelled speech if the judges feel the disclosure covers topics subject to public debate. *See Recht v. Morrisey*, 32 F.4th 398, 416 (4th Cir. 2022) ("[T]he Supreme Court cautioned against applying *Zauderer* to disclosures that . . . compel speech on hotly contested topics.") (citations omitted); *see also* Sarah C. Haan, *The Post-Truth First Amendment*, 94 IND. L.J. 1351, 1351 (2019) ("[A] legal framework that calibrates disclosure law to the controversiality of the underlying information is paradigmatically post-truth.").

Very few courts have accepted Justice Thomas's invitation to embrace such a politically tinged meaning of "uncontroversial," and in the few instances where they have accepted it, they have ruled contrary to how Justice Thomas likely would have ruled. *See, e.g.*, *Bongo Prods., LLC v. Lawrence*, 603 F. Supp. 3d 584, 592 (M.D. Tenn. 2022) (striking down a statute requiring facility owners that permit transgender people to use the bathroom that matches their identity to post signs stating "THIS FACILITY MAINTAINS A POLICY OF ALLOWING THE USE OF RESTROOMS BY EITHER BIOLOGICAL SEX, REGARDLESS OF THE

DESIGNATION ON THE RESTROOM"); *see generally Maryland Shall Issue, Inc. v. Anne Arundel County*, No. 22-00865, 2023 U.S. Dist. LEXIS 48566 (D. Md. 2023) (finding statute requiring gun retailers to distribute pamphlets on suicide prevention and violent conflict resolution uncontroversial). The majority of lower courts analyzing the term "uncontroversial" have focused little, if at all, on the political controversy behind the topic of the disclosure. Some, indeed, have declined to acknowledge that *NIFLA* changed compelled commercial speech doctrine at all. *See Loan Payment Admin. LLC v. Hubanks*, No. 14-CV-04420-LHK, 2018 WL 6438364 (N.D. Cal., 2018), *aff'd*, 821 F. App'x 687 (9th Cir. 2020) ("*NIFLA* simply applied the existing *Zauderer* standard."). Perhaps this pattern indicates that *NIFLA*, being an abortion case, is categorically different. *See Porcelli v. United States*, 404 F.3d 157, 161 (2d Cir. 2005) ("Supreme Court jurisprudence about abortion is sui generis . . . .").

Most courts have adopted, rather, one or more of three prominent lines of reasoning: (1) an "Ambiguity-Based" approach where a disclosure is controversial if an ordinary consumer may draw one or more reasonable inferences that would be misleading; (2) a "Relatedness" approach where courts find a disclosure controversial if it is unrelated to the speaker's product or service; or (3) a "Factually Debated" approach where a disclosure is controversial if experts in the field would disagree about its truth. Regardless of the line of reasoning courts adopted, the best way to predict how a court will rule is that a disclosure is likely controversial when it is aimed at discouraging consumers from all uses the speaker's product or service, whereas a disclosure aimed at dissuading only some uses, or maybe no uses at all, of the speaker's product or service is likely uncontroversial.

This memo examines thirteen relevant cases in analyzing the "Dissuasion Framework" driving the courts and proceeds to discuss the reasoning used in those cases. The examined cases

are limited to those (1) citing *NIFLA* and (2) analyzing whether a disclosure is uncontroversial in deciding whether to apply *Zauderer*. Part I explains the Dissuasion Framework and defends it as the best predictor of how courts will rule on a disclosure. Part II covers Ambiguity-Based reasoning. Cases endorsing this approach tend to find a disclosure controversial if an ordinary consumer could draw one or more reasonable interpretations that would be misleading. Part III covers Relatedness reasoning, which finds disclosures are controversial when their content is unrelated to the speaker's product or service. Part IV covers Factually Debated reasoning. These cases tend to pay close attention to expert opinions and invalidate disclosures when experts might disagree on their truth. Finally, Part V covers Controversial-to-Society reasoning, the approach invited by Justice Thomas in *NIFLA*. This last section discusses the few cases supporting, and the cases expressly rejecting, a definition of "uncontroversial" that provides that the topic of the disclosure must not be a matter of public debate.

I. The Dissuasion Framework: Disclosures are Controversial When They Dissuade All Uses of the Speaker's Product or Service.

The best predictor of whether a court will find a disclosure controversial is whether that disclosure aims to dissuade all uses of the speaker's product or service, as opposed to some or no uses. The first step to this analysis is determining what constitutes dissuasion. Warning of a negative result associated with the product or service is the most common type of dissuasion seen in commercial disclosures. *See R.J. Reynolds Tobacco Co. Plaintiffs v. United States FDA*, No. 6:20-cv-00176, 2022 U.S. Dist. LEXIS 221015, at *32 (E.D. Tex. 2022) ("[I]t is not beyond reasonable probability that consumers would take from [the disclosure on cigarettes] a value-

laden message that smoking is a mistake."). A disclosure dissuades a use of the speaker's product or service when it explicitly states or strongly suggests that a use causes the negative result mentioned. *See, e.g.*, *Nat'l Ass'n of Wheat Growers v. Becerra*, 468 F. Supp. 3d 1247, 1258 (E.D. Cal. 2020) ("[The warning,] which requires language stating 'WARNING: Cancer - www.P65Warnings.ca.gov.' . . . conveys the message [that the product] is known to cause and actually causes cancer."). However, prices or information about terms of service are not a "bad result" for purposes of the Dissuasion Framework because they merely inform consumers about the product or service they are considering using. *See AHA v. Azar*, 468 F. Supp. 3d 372, 391 (D.D.C. 2020) (upholding portion of the Affordable Care Act requiring hospitals to publish list of standard charges); *Loan Payment Admin. LLC v. Hubanks*, 821 F. App'x 687, 689-90 (9th Cir. 2020) [hereinafter, *Loan Payment II*] (holding uncontroversial a requirement that intermediary loan companies disclose that they are not affiliated with the lender when soliciting clients). *Zauderer* itself concerned compelling disclosure of a lawyer's contingency fee structure and set the standard of "factual and uncontroversial." 471 U.S. at 651.

Disclosures that describe a negative result that is either not related to the speaker's product or service, or only tenuously related, do not dissuade consumers at all. *Maryland Shall Issue*, 2023 U.S. Dist. LEXIS 48566, at *40 (finding disclosure uncontroversial where gun manufacturers were compelled to distribute pamphlets because "the pamphlets themselves only speak to the uncontroversial topics of suicide prevention and nonviolent conflict resolution" rather than guns). *Maryland Shall Issue* is an example of a relationship too tenuous to dissuade. *See id.* There, gun retailers were compelled to distribute pamphlets about conflict resolution and suicide prevention inside their stores. *See id.* The court found this requirement did not make the

pamphlets *about* guns, suggesting the disclosure did not dissuade from any uses of guns, or at most only dissuaded from using guns in the manner warned of in the pamphlets. *See id.*

Disclosures that only implicitly connect a use of the speaker's product or service to a negative result present a close question and may still dissuade consumers from that use when the surrounding circumstances encourage it. *See Bongo*, 603 F. Supp. 3d at 609 ("Whether any particular mandated message is controversial must be ascertained by considering that message in the context of the society and setting in which the message is being required."). For example, in *Bongo*, the statute required facility owners who allowed transgender people to use the bathroom that matched their identity to post all-capital letters signs on their bathrooms doors warnings that members of "either biological sex" may use that bathroom. *Id.* at 592. Many people would not be dissuaded from using the bathroom just by an understanding that they may encounter someone they perceive as a member of the opposite sex while inside, but the court considered the disclosure in the context of a prevalent fear among Tennesseans that transgender bathrooms invite attacks by sexual predators. *Id.* at 593 ("Indeed, the 'message that gender identity protections create peril in bathrooms' is so commonplace that it even has a colloquial name: the 'bathroom argument.'") (quoting Marie-Amélie George, *Framing Trans Rights*, 114 NW. U. L. REV. 555, 581 (2019)). Viewed through this lens, the disclosure certainly dissuaded patrons from using the bathroom and, consequently, dissuaded them from entering the building at all. *Id.* at 608-09.

Drawing the line between disclosures that dissuade *all* uses of a product or service, and disclosures that dissuade *some* uses depends on whether the dissuading negative result warned of in the disclosure is conditional. *See infra* Figure 1 (omitted). Disclosures that tie an unconditional negative result to the product or service are dissuading consumers from all uses of

that product or service. *See, e.g.*, *Cal. Chamber of Com. v. Council for Educ. & Rsch. on Toxics*, 29 F.4th 468, 473 (9th Cir. 2022) ("WARNING: Consuming this product can expose you to acrylamide, which is known to the State of California to cause cancer."). Generally, disclosures that make a negative result conditional are only dissuading from a specific use. *See CTIA – The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 840 (9th Cir. 2019) (requiring cell phone manufacturers to disclose in their manuals that holding cell phones certain ways can expose users to radio-frequency radiation). However, if the negative result is conditioned on an unpredictable event, the disclosure dissuades all uses. *See Masonry Bldg. Owners of Or. v. Wheeler*, 394 F. Supp. 3d 1279, 1287 (D. Or. 2019). For example, consider the disclosure in *Wheeler*: "THIS IS AN UNREINFORCED MASONRY BUILDING. UNREINFORCED MASONRY BUILDINGS MAY BE UNSAFE IN THE EVENT OF A MAJOR EARTHQUAKE." *Id.* Because major earthquakes are nearly impossible to predict, the disclosure in *Wheeler* warning that certain buildings are unsafe to enter during an earthquake, is essentially the same as saying these buildings are unsafe to enter *at any time*. *See id.* Therefore, the disclosure deters all uses, is controversial, and *Zauderer* does not apply. *Id.* at 1303. Compare *Wheeler* with the disclosure in *CTIA*, 928 F.3d at 840. Because the disclosure in *CTIA* warns of a harm (exposure to radio-frequency radiation) conditioned on an event within the consumer's control (how they hold their phone), the disclosure only dissuades some uses, is uncontroversial, and *Zauderer* applies. *CTIA*, 928 F.3d at 848.

Twelve of the thirteen relevant cases delivered holdings consistent with the Dissuasion Framework discussed above. *See infra* Figure 2 (omitted). No case rejected the framework. *Id.* The only case that was not consistent with the framework, *Baptiste v. Kennealy*, presented a disclosure to which the framework cannot be properly applied. *See* 490 F. Supp. 3d 353, 377 (D.

Mass. 2020). In *Baptiste*, a Massachusetts statute required landlords giving notice of arrearage to tenants to include website addresses for tenants' rights organizations that could help the tenants resist the landlord's efforts to make them pay. *Id.* The court found this disclosure controversial and struck it down. *Id.* The framework does not apply because, in a situation where a landlord is sending a notice of arrearage, they are not trying to convince a tenant to rent a unit from them, but rather to pay rent that the tenant already owes: The tenant is not a "consumer" in the same sense that we think about consumers for purposes of the Dissuasion Framework because the speaker is not aiming to sell them a product or service. Whether the disclosure within a notice of arrearage dissuades the tenant from renting from that landlord in the future is irrelevant. However, a principle similar to that of the Dissuasion Framework still explains the holding: The disclosure dissuaded tenants from taking the action the landlords sought (paying the overdue rent) by offering the tenants legal resources to resist. *See id.*

So far, courts have consistently followed the Dissuasion Framework, though the sample size is small and it is unclear if courts had this framework in mind while deciding these cases. The rest of this memo discusses the lines of reasoning used in the same thirteen relevant cases. *See infra* Figure 3 (omitted) (note that some cases use more than one line of reasoning).

II. The "Ambiguity-Based" Line of Reasoning: Seven Cases Have Found a Disclosure Controversial Where One or More of its Reasonable Interpretations is Misleading.

Most courts reason that, if a disclosure is ambiguous, and one or more of its reasonable interpretations is misleading, then it is controversial. *See, e.g.*, *Council for Educ. & Rsch. on Toxics*, 29 F.4th at 479 (disclosure that a chemical is "known" to cause cancer was

controversial where it could be interpreted to mean that chemical is likely to cause cancer); *Wheat Growers*, 468 F. Supp. 3d at 1259 (same). "[A] statement may be literally true but nonetheless misleading[,]" making it controversial. *See CTIA*, 928 F.3d at 847. *But see Recht*, 32 F.4th at 417 ("It is the communicative *content* of the message, rather than the format, that is dispositive.") (emphasis added). Courts have been concerned with the perspective of the "ordinary consumer" when considering if multiple reasonable interpretations of a disclosure existed. *See Wheeler*, 394 F. Supp. 3d at 1302 ("While structural engineers may understand [the language of the disclosure to have] a particular meaning . . . [o]rdinary consumers do not interpret warnings in accordance with a complex web of statutes, regulations, and court decisions."); *Am. Bev Ass'n v. City & Cty. Of San Francisco*, 916 F.3d 749, 766 (9th Cir. 2019) (Christen, J. and Thomas, C.J., concurring) ("Because the message would be conveyed to sophisticated and unsophisticated consumers, we must read it literally."). "[I]magery can be more prone to ambiguous interpretation." *R.J. Reynolds*, 2022 U.S. Dist. LEXIS 221015, at *31.

R.J. Reynolds illustrates how courts following Ambiguity-Based reasoning analyze controversiality of a disclosure. *Id.* at *31. In *R.J. Reynolds*, plaintiff tobacco companies challenged an FDA rule requiring them to label cigarettes with disclosures combining images and text that warned of risks associated with smoking. *Id.* at *15. The court found the disclosures controversial, reasoning that ordinary consumers could interpret the images to depict the *most common* consequences of smoking, despite accompanying text saying smoking "can cause" the depicted consequences. *Id.* at *33-*34. The court found this interpretation misleading because the images depicted ailments such as open-heart surgery and neck tumors, which are only *possible* consequences of smoking. *Id.* "Because of their capacity for multiple reasonable

interpretations, consumers may perceive expression whose truth has not been established by the record." *Id.* at *34.

The Ninth Circuit supported this rule in *Council for Educ. & Rsch. on Toxics*, holding that a disclosure that a food ingredient is "known" to cause cancer is misleading and, therefore, controversial. *See* 29 F.4th at 479. In doing so, the Ninth Circuit reasoned that ordinary consumers would be misled by the word "known" and believe that the chemical has been proven to cause cancer, while in reality, there is still scientific disagreement about whether it does. *See id.*

Ambiguity-Based reasoning's rationale is avoiding deception of the consumer. *See Wheeler*, 394 F. Supp. 3d at 1302. While most of the fear of deception focuses on avoiding misleading government messaging in disclosures, *Upton's* offers an example of a court's concern for deception by a manufacturer and the government's role in correcting that deception. *See Upton's Nats. Co. v. Stitt*, No. CIV-20-938-F, 2020 U.S. Dist. LEXIS 216883, at *6-*7 (W.D. Ok. 2020). The *Upton's* court found it misleading that the *plaintiff* labeled their meatless products "Ch'eesy Bacon Mac," "Classic Burger," and "Jerky Bites" (even though the packages were also labeled "VEGAN"). *Id.* at *7. The Oklahoma statute required the plaintiff to place a disclosure on their packaging the same size as the product name itself, stating that the product was plant-based. *Id.* The court found this to be uncontroversial because it protected consumers from otherwise misleading messaging. *Id. Upton's* suggests a double-edged approach to this rule, allowing courts to find a disclosure controversial when it is itself misleading but to find a disclosure uncontroversial when the underlying labeling is misleading. *See id.*

III. The "Relatedness" Line of Reasoning: Four Cases Have Found a Disclosure Controversial When it is Unrelated to the Speaker's Product or Service.

Four courts have held that disclosures are controversial when their content is unrelated to the speaker's product or service. *See, e.g., Baptiste*, 490 F. Supp. at 416 ("[T]he Supreme Court cautioned against applying *Zauderer* to disclosures that in no way relate to the services being offered . . .") (quotations omitted). This reasoning comes from *NIFLA* itself, which noted in a frequently cited passage that the disclosure "in no way relates to the services that licensed clinics provide." *NIFLA*, 138 S. Ct. at 2372; *accord Loan Payment II*, 821 F. App'x at 689-90 ("We have interpreted *NIFLA* as holding that *Zauderer* applies so long as the compelled speech relates to the product or service that is provided by an entity subject to the requirement.").

Though *NIFLA* and *Baptiste* both use the language "in no way relates," unrelated may be better defined as "not directly relevant." *See AHA*, 468 F. Supp. 3d at 391 (finding hospitals' required disclosure of service prices uncontroversial where it was "*directly relevant* to the terms . . . under which the [hospitals'] services will be available.") (emphasis added); *Baptiste*, 490 F. Supp. 3d at 377. Recall the disclosure from *Baptiste*. *See supra* pp. 7-8; 490 F. Supp. 3d at 377. The court there found that the disclosure of tenants' rights organization's websites was controversial because it did not "relate directly to the services provided by landlords." *Id.* The situation in *NIFLA* was analogous: the statute forced crisis pregnancy centers to provide information about abortion clinics. *See NIFLA*, 138 S. Ct. at 2371. Information about abortion clinics is quite notably related to the crisis pregnancy centers' services: Abortion clinics are exactly where the centers aim for their patrons to avoid. *See id.*; *see also Baptiste*, 490 F. Supp.